TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. 45

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

[illegible]

IN ERROR TO THE UNITED STATES CIRCUIT COURT
FOR THE EASTERN DISTRICT OF TEXAS.

(16,000)

(18,950.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 48.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

W. W. SWEARINGEN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from circuit court of the United States for the western district of Texas	a	1
Caption	1	1
Transcript from district court of El Paso county	1	2
Plaintiff's original petition	2	2
Citation to Texas and Pacific Railway Company	4	4
Sheriff's return on citation	5	5
Petition for removal	6	5
Bond for removal	9	8
Order of removal	10	9
Plaintiff's first amended original petition	11	9
Defendant's first amended original answer	14	12
Motion to instruct jury to return verdict for defendant	16	14
Judgment	17	15
Motion for new trial	18	15
Order allowing defendant to amend motion for new trial	19	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1904.

	Original.	Print
Defendant's first amended motion for new trial	19	17
Order overruling defendant's motion for new trial	21	18
Order extending time to file bill of exceptions	21	18
Bill of exceptions	22	19
Facts about which there is no dispute	22	19
Testimony of plaintiff	23	20
Dr. H. E. Stevenson, for plaintiff	28	24
E. B. Smith, for plaintiff	28	24
Robert Myrtle, for plaintiff	30	25
Frank I. Williams, for defendant	30	26
W. T. Butts, for defendant	32	27
S. M. West, for defendant	33	28
R. P. Moore, for defendant	35	30
Dr. A. L. Justice, for defendant	36	31
Plaintiff's application for employment	36	31
Special charge requested by defendant and refused	37	32
Charge of the court	38	32
Motion for order to send up original paper	42	36
Order to send up original paper	43	37
Assignment of errors	43	37
Petition for writ of error and order allowing	46	39
Writ of error	47	40
Bond	48	41
Citation and acknowledgment of service	49	42
Clerk's certificate	50	43
Submission	51	43
Final judgment	51	43
Opinion of the court	52	44
Assignments of error	70	58
Bond	73	60
Clerk's certificate	74	61
Writ of error	75	62
Citation and service	77	63

a *Caption.*

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1902, and held in the court room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges, for the fifth judicial circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
W. W. SWEARINGEN, Defendant in Error. } No. 1219.

Be it remembered, that heretofore, to-wit: on the 14th day of January, 1903, a transcript of record of the above styled cause from the circuit court of the United States for the western district of Texas, was filed in the office of the clerk of said United States circuit court of appeals for the fifth circuit in the words and figures following, to-wit:

1 *Caption.*

Be it remembered, that there was opened and begun to be holden a regular term of the United States circuit court of fifth circuit and western district of Texas, at El Paso, on the third day of November, A. D. 1902, it being the first Monday in said month and the day fixed by law for commencing a regular term of said court at said place.

Present: The Honorable Thomas S. Maxey, United States district judge; Honorable Henry Terrell, United States district attorney; George L. Siebrecht, United States marshal for said district, and D. H. Hart, clerk of said court; when and where the following proceedings, among others, were had, to-wit:

W. W. SWEARINGEN
versus
TEXAS & PACIFIC RAILWAY COMPANY. } No. 323.

Transcript from District Court of El Paso County.

Filed August 25, 1902.

2 *Plaintiff's Original Petition.*

Filed February 24, 1902.

In the District Court of El Paso County, Texas, 34th Judicial District, to April Term, A. D. 1902.

W. W. SWEARINGEN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 4015.

To the honorable district court of El Paso county, Texas:

In the cause above styled and numbered, W. W. Swearingen, hereinafter called plaintiff, complains of The Texas & Pacific Railway Company, hereinafter called defendant, and for cause of action against said defendant alleges:

That plaintiff is a resident of El Paso county, Texas, and the defendant is a corporation duly incorporated and acting and has an office and an agent for the transaction of its business in El Paso county, Texas, and said agent's name is A. W. Montague, and he resides in said county.

That the defendant, at all the times hereinafter mentioned, owned, conducted and operated, and now owns, conducts and operates, a line of railroad running into and through said El Paso county and across the State of Texas, and its line of railroad enters the city of El Paso, where it has tracks and switches constituting a general switch yard for the handling, switching and shifting of its cars, both passenger and freight.

That, on and prior to the 7th day of February, A. D. 1902, the plaintiff was and had been in the employ of the defendant in the capacity of switchman in defendant's said switch yards in the city of El Paso, Texas, and his duties as such switchman were to couple and uncouple cars, shift switches and assist generally in the shifting, switching and placing of cars on the various tracks in said defendant's said switch yards, said cars being moved by means of a locomotive attached thereto; that his said duties were performed under the supervision and direction of another employé of the defendant known as a yardmaster, who has full authority in that behalf; that, on said 7th day of February, A. D. 1902, while engaged in the per-

formance of his duties as such switchman in defendant's said switch yards, at El Paso, Texas, plaintiff was riding on a certain freight car of a train of cars attached to one of defendant's locomotives, and being then switched along track No. 2 of said
3 switch yards, his position being on the lower part of the ladder attached to said car for use by such employés in such cases, that in order to maintain his position on said ladder plaintiff was compelled to swing his body slightly away from said car; that said cars were being pulled in a westerly direction along said track by said locomotive, and the said yard master was at the east end of said cars, from which point he was directing their movements by signals given to plaintiff and other employés by means of a lighted lantern, it being in the night time, and plaintiff, being in the position above stated, was looking in the direction of said yard master for such signals as he might give, when plaintiff's body came in violent contact with a structure constituting a portion of a set of track scales, which had been carelessly and negligently placed by defendant so near said track and the north rail thereof as not to admit of passage of plaintiff's body between it and said car upon which he was riding in the position occupied by him on said car, which position was a proper one, and by reason of so coming in contact with said structure so negligently and carelessly placed by defendant, plaintiff was knocked and thrown from said car to the ground with great force and violence, and was caught under the end of the truck of said car and pushed and dragged with great force and violence along the ground for a great distance, by reason of all of which he was greatly bruised, lacerated, maimed and injured in his right shoulder and back, and in his neck, face, head and lungs, and three of his ribs broken, and his spinal cord injured, being rendered unconscious thereby for a great length of time, and by reason thereof has suffered, and now suffers, great bodily pain and mental anguish; that said injuries to plaintiff's back and lungs are and will be permanent in their character and effects, and plaintiff will continue so long as he lives to suffer therefrom great bodily pain and mental anguish; that by reason of said injuries plaintiff is now and will ever be so disabled and weakened as to prevent the performance by him of manual labor, such as hitherto he could perform, and has performed, and by means of which he has earned his livelihood.

That said scale structure is of a permanent character and was placed there by the defendant, and it was, at the time plaintiff received his said injuries and for many months previous thereto, so close to the north rail of said track as to endanger the lives and limbs of plaintiff and other employés of defendant engaged in switching in said yards, and these facts were well known to defend-
ant, or by the exercise of ordinary care could have been
4 known to it, but were wholly unknown to plaintiff; that the place and manner of plaintiff's riding on said car were proper and usual for employés engaged in such services, and plaintiff was

not aware of the fact that said car upon which he was riding was about to approach or pass said structure.

That said injuries were so inflicted upon the plaintiff without fault on his part and wholly by reason of defendant's carelessness and negligence in so placing said scale structure as to endanger the life and limbs of plaintiff, as above set forth, and plaintiff is damaged by reason of said injuries in the sum of fifteen thousand ($15,000.00) dollars.

Wherefore, premises considered, plaintiff prays that defendant be cited to answer this petition, and that upon final hearing he have judgment against said defendant for his said damages in said sum of fifteen thousand ($15,000.00) dollars, and for all costs and such other and further relief as to the court may seem meet and proper.

R. V. BOWDEN,
Attorney for Plaintiff.

(Indorsed:) No. 4015. W. W. Swearingen *vs.* The Texas & Pacific Railway Company. Plaintiff's original petition. Filed this 24th day of February, A. D. 1902. I. Alderete, clerk district court, El Paso county, Texas, Abe Alderete, deputy.

Citation.

Issued February 24, 1902; filed April 4, 1902.

The State of Texas to the sheriff or any constable of El Paso county, Greeting:

You are hereby commanded to summon the Texas & Pacific Railway Company, a corporation, to be and appear before the honorable district court of El Paso county, Texas, at the next regular term thereof, to be holden at the courthouse, in the city of El Paso, on the first Monday in April, A. D. 1902, same being the 7th day of April, A. D. 1902, then and there to answer the plaintiff's petition filed in a suit in said court on the 24th day of February, A. D. 1902, wherein W. W. Swearingen is plaintiff and The Texas & Pacific Railway Company is defendant, file number of said suit being No. 4015. The nature of the plaintiff's demand is as follows, to-wit:

To recover the sum of $15,000.00 as damages for personal injuries inflicted upon plaintiff while working as a switchman for defendant in its yards at El Paso, Texas, said injuries being inflicted by reason of the defendant carelessly and negligently erecting and constructing a track scale structure so near its switch tracks that plaintiff was struck by same while riding on the side of one of defendant's cars while performing his duties as switchman for defendant, and wholly without fault on his part. Plaintiff asks judgment for $15,000.00 and costs, and all proper relief.

And you will deliver to said defendant, by delivering to A. W.

Montague, its agent in El Paso county, Texas, in person a true copy of this citation.

Herein fail not, and have you before said court this writ, with your indorsement thereon, showing how you have executed the same.

Given under my hand and the seal of said court, at office, in El Paso, Texas, this the 24th day of February, A. D. 1902.

Attest: I. ALDERETE,
Clerk District Court, El Paso County, Texas,
[SEAL.] By M. L. BARLOW, *Deputy.*

Sheriff's Return.

Came to hand the 24th day of February, A. D. 1902, at 11 o'clock —. m., and executed the 27th day of February, A. D. 1902, by delivered to A. W. Montague, local agent for the within named defendant, in person, a true copy of this writ.

J. H. BOONE,
Sheriff El Paso County, Texas,
By R. E. BRYANT, *Deputy.*

(Indorsed:) File No. 4015. District court, El Paso county, Texas, April term, 1902. W. W. Swearingen *vs.* The Texas & Pacific Railway Company. Citation. Issued February 24th, 1902. I. Alderete, district clerk, by M. L. Barlow, deputy. Filed the 4th day of April, 1902. I. Alderete clerk, by M. L. Barlow, deputy.

6 *Petition for Removal.*

Filed April 1, 1902.

In the District Court of El Paso County, Texas, 34th Judicial District.

W. W. SWEARINGEN
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 4015.

Petition for removal.

The petition of the Texas and Pacific Railway Company respectfully shows to the court:

First. That the Texas and Pacific Railway Company was, and is, a corporation, duly organized and existing under and by virtue of the laws of the United States, to-wit: "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and acts

amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby, among other things, the name, style and title of said Texas Pacific Railroad Company was changed to "The Texas and Pacific Railway Company."

Second. That the above entitled action was commenced in the above named court on the 24th day of February, A. D. 1902, and citation issuing therein was served upon this defendant on the 27th day of February, A. D. 1902, which said citation is returnable on the first Monday in April, A. D. 1902, it being the 7th day of April, A. D. 1902, and this defendant is not and will not be required, by the laws of the State of Texas, or the rule of this court, to answer or plead to the petition of the plaintiff before the 8th day of April, A. D. 1902.

Third. That the matter in dispute in this case exceeds, exclusive of interest and cost, the sum or value of two thousand dollars, and this suit arises under the laws of the United States as hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff, who alleges that, on the 7th day of February, 1902, while he was in the employ of defendant as a switchman, and while engaged in his duties as such switchman in defendant's switch
7 yards at El Paso, Texas, he was riding in a proper place and position on the ladder of a freight car of a train of cars attached to one of defendant's locomotives, which was being switched along track No. 2 of said yards, when his body, through no negligence of his own, came in contact with a structure forming part of a set of track scales which defendant had negligently and carelessly placed so near the rail of said track as to not admit the passage of plaintiff's body between it and said cars, and the result of so coming in contact with said car structure was that plaintiff was knocked down from said car with great force and caught under the end of the truck of said car, and dragged a great distance, and thereby permanently injured to his damage in the sum of fifteen thousand ($15,000.00) dollars, through no fault or negligence of his own, but through the fault, negligence and carelessness of defendant as appears from plaintiff's petition, which is referred to for a more particular statement of the cause of action. That the suit against this defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States constituting the charter of this defendant, and under which it was incorporated, that is to say, the said act of Congress of the United States approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," and acts amendatory thereof, and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874.

Fourth. That the above entitled action is a civil suit arising under the laws of the United States, of which the circuit court of the United States for the western district of Texas is given original jurisdiction by act of Congress approved March 3, 1887, to-wit: an act

entitled "An act to amend the act of Congress approved March 3, 1875, entitled 'An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes,' and the acts of Congress approved August 13, 1888, entitled "An act to correct the enrollment of an act approved March 3, 1887, entitled 'An act to amend sections 1, 2, 3 and 10 of an act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes, approved March 3, 1875.'"

Your petitioner herewith presents and files a good and sufficient bond conditioned that it will enter and file in the circuit court of the United States for the western district of Texas, on the first
8 day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite herein. Your petitioner therefore prays the said court to accept said petition and bond, and to remove this cause to the circuit court of the United States for the western district of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By PEYTON F. EDWARDS AND PEYTON J. EDWARDS,
Attorneys.

THE STATE OF TEXAS, }
County of El Paso. }

R. W. Curtis, being duly sworn, says that he is the agent of Texas and Pacific Railway Company, being the southwestern freight & passenger agent of said company, that the said The Texas and Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States; that he has read the foregoing petition and knows the contents thereof; that the facts herein stated are true.

R. W. CURTIS.

Sworn to and subscribed before me, this 31st day of March, A. D. 1902.

[SEAL.] R. C. WALSHE,
Notary Public, El Paso County, Texas.

(Indorsed:) No. 4015. W. W. Swearingen *vs.* The Texas and Pacific Railway Company. Petition for removal. Filed the 1st day of April, A. D. 1902. I. Alderete, clerk district court, El Paso county, Texas. By Abe Alderete, deputy.

9 *Bond for Removal.*

Filed April 1, 1902.

In the District Court of El Paso County, Texas, 34th Judicial District.

W. W. SWEARINGEN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 4015.

Know all men by these presents: That the Texas and Pacific Railway Company, as principal, and Joseph Magoffin and J. C. Lackland, as sureties, are held and firmly bound unto W. W. Swearingen, in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made, unto the said W. W. Swearingen, his heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assigns, unto the said W. W. Swearingen, his heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assigns, firmly by these presents, yet upon these conditions, that:

Whereas, the said Texas and Pacific Railway Company has filed its petition in the district court of El Paso county for the removal of a certain cause therein pending, wherein W. W. Swearingen, is plaintiff, and the Texas and Pacific Railway Company is defendant, said cause being numbered upon the docket of said court at No. 4015, to the circuit court of the United States for the western district of Texas.

Now, therefore, if the said The Texas and Pacific Railway Company shall enter in said circuit court of the United States for the western district of Texas, a copy of the record in said suit on the first day of next session thereof, and shall pay all costs which may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the same was originally requisite in said cause, then this obligation shall be void; otherwise of full force and effect.

Witness our hands and seal- this 31st day of March, 1902.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By PEYTON F. EDWARDS AND
PEYTON J. EDWARDS, *Attorneys.*
JOSEPH MAGOFFIN.
J. C. LACKLAND.

10 Approved this 7th day of April, 1902.

A. M. WALTHALL,
Judge District Court, 34th Judicial District

(Indorsed:) No. 4015. W. W. Swearingen *vs.* The Texas and Pacific Railway Company. Bond for removal. Filed the 1st day of April, A. D. 1902. I. Alderete, clerk district court, El Paso county, Texas, by Abe Alderete, deputy.

Order of Removal.

Dated April 10, 1902.

In the 34th Judicial District Court of El Paso County, Texas.

W. W. SWEARINGEN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 4015.

This cause coming on the 7th day of April, A. D. 1902, to be heard, upon the petition of the Texas and Pacific Railway Company, to remove same to the circuit court of the United States for the western district of Texas, said petition being heard by the court, and it appearing to the court that a good and sufficien- bond has been filed, and that said petition shows proper grounds for removal, the prayer of the said The Texas & Pacific Railway Company, is granted and its bond approved and on this the 10th day of April, A. D. 1902, this cause ordered removed to the circuit court of the United States for the western district of Texas. And the clerk of this court will make out a transcript of the record in this cause, to be filed in the United States court for the said district of Texas.

A. M. WALTHALL, *Judge.*

(Indorsed:) No. 4015. 34th judicial district. W. W. Swearingen *vs.* The Texas & Pacific Ry Co. Order of removal.

(Transcript endorsed:) No. 323. W. W. Swearingen *vs.* The Texas & Pacific Ry Co. Transcript. Filed this 25 day of Aug., 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

11 *Plaintiff's First Amended Original Petition.*

Filed November 11, 1902.

In the Circuit Court of the United States in and for the Western District of Texas, Sitting at El Paso, November Term, A. D. 1902.

W. W. SWEARINGEN, Plaintiff,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant. } No. 323.

To the honorable the judge of said United States circuit court:

In the cause above styled and numbered, comes at this day W. W. Swearingen, plaintiff, and hereinafter so called, and by leave of

court first had and obtained, files herein this his first amended original petition, in lieu of his original petition, filed in this cause in the district court of El Paso county, Texas, in which this cause originated, on the 24th day of February, A. D. 1902, and for his amended cause of action against the defendant, The Texas & Pacific Railway Company, alleges:

The plaintiff is a citizen of the United States and of the State of Texas and a resident of said western district of Texas, residing in El Paso county, Texas, and the defendant is a corporation duly incorporated and existing under and by virtue of the laws of the United States, and has and had at the time of filing of the original petition in this said cause an office and an agent in said El Paso county, Texas; and said agent's name is A. M. Montague, and he then resided, and resides, in said El Paso county, Texas.

That the defendant, at all the times hereinafter mentioned, owned, conducted and operated, and now owns, conducts and operates, a line of railroad running into and through said El Paso county, and across the State of Texas, and its line of railroad enters the city of El Paso, where it has tracks and switches constituting a general switch yard for the handling, switching and shifting of its cars, both passenger and freight.

That on and prior to the 7th day of February, A. D. 1902, the plaintiff was, and had been, in the employ of the defendant, in the capacity of switchman in defendant's said switch yards in the city of El Paso, Texas, and his duties as such switchman were to couple and uncouple cars, shift switches and assist generally in the shifting,
switching and placing of cars on the various tracks in said
12 defendant's said switch yards, said cars being moved by means of a locomotive attached thereto; that his said duties were performed under the supervision and direction of another employé of the def't known as a yard master, who has full authority in that behalf; that on said 7th day of February, A. D. 1902, while engaged in the performance of his duties as such switchman in defendant's said switch yard, at El Paso, Texas, plaintiff was riding on a certain freight car of a train of cars attached to one of defendant's locomotives and being then switched along track No. 2, of said switch yards, his position being on the lower part of the ladder attached to said car for use of such employés in such cases; that in order to maintain his position on said ladder plaintiff was compelled to swing his body slightly away from said car; that said cars were being pulled in a westerly direction along said track by said locomotive and the said yard master was at the east end of said cars, from which point he was directing their movements by signals given to plaintiff and other employés by means of a lighted lantern, it being in the night time, and plaintiff being in the position as above stated, was looking in the direction of said yard master for such signals as he might give, when plaintiff's body came in violent contact with a structure constituting a portion of a set of track scales which had been carelessly and negligently placed by defendant or permitted by defend-

ant to remain so near said track and the north rail thereof as not to admit of passage of plaintiff's body between it and said car, upon which he was riding in the position occupied by him on said car, which position was a proper one, and by reason of so coming in contact with said structure so negligently, and carelessly placed or permitted to be there by defendant plaintiff was knocked and thrown from said car to the ground with great force and violence and was caught under the end of the truck of said car and pushed and dragged with great force and violence along the ground for a great distance by reason of all of which he was greatly bruised, lacerated, maimed and injured in his right shoulder and back and in his neck, face, chest, head and arms, and three of his ribs broken and his spinal column injured, being rendered unconscious thereby for a great length of time, and by reason thereof has suffered, and now suffers, great bodily pain and mental anguish, and was thereby necessarily confined to his bed in a hospital under the care and direction of a physician for a period of three months; and said injuries to plaintiff's back, chest, spinal column and lungs are, and will be, permanent in their character and effects, and plaintiff will continue so long as he lives to suffer therefrom great bodily pain and mental anguish; and that by reason of said injuries plaintiff is now and will ever be so
13 disabled and weakened in his back, chest and lungs and spinal column as to prevent the performance by him of manual labor, such as hitherto he could perform and has performed, and by means of which he has earned and was and is compelled to earn his livelihood.

That said scale structure, sometimes called a scale box, is and was of a permanent character and had been, for many months previous to the time plaintiff received his said injuries, at said place where plaintiff came in contact with it, and had been there placed and, during all of said time, maintained and used by defendant, or was by defendant permitted to there remain during all of said time, the def'd't knowing or by the exercise of ordinary care could have known, the location of same, and was during all of said time so close to the northerly rail of said track as to endanger the limbs and lives of plaintiff and other employés of defendant while engaged in the performance of their duties in switching in said yards and thereby constitute a dangerous obstruction to said track, all of which facts were well known to the defendant or by the exercise of ordinary care could have been known to it, but were wholly unknown to plaintiff; that the place and manner of plaintiff's riding on said car were proper and usual for employés engaged in such service, and plaintiff was not aware of the fact that said car upon which he was riding was about to approach or pass said structure.

That in placing said scale structure or box at the place as above recited, or permitting same to remain there after being so placed, when the defendant knew, or by the exercise of ordinary care could have known, that it was so placed, the defendant was guilty of carelessness and negligence and it was wholly by reason of said careless-

ness and negligence that plaintiff received his said injuries; that by reason of said injuries so negligently and carelessly inflicted upon him by defendant he had been and is damaged in the sum of twenty-five thousand ($25,000) dollars.

Wherefore, all parties being before the court, plaintiff prays that upon final hearing he have judgment against said defendant for his said damages in said sum of twenty-five thousand ($25,000) dollars, and for all costs and such other and further relief as to the court may seem meet and proper, and of all this he puts himself upon the country.

R. V. BOWDEN,
Attorney for Plaintiff.

(Indorsed:) No. 323. In the circuit court of the United States in and for the western district of Texas. Sitting at El Paso. W. W. Swearingen, plaintiff, *vs.* The Texas & Pacific Railway Co., 14 defendant. Plaintiff's first amended original petition. Filed Nov. 11, 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy. R. V. Bowden, att'y for pl'ff.

Defendant's First Amended Original Answer.

Filed November 12, 1902.

In the United States Circuit Court for the Western District of Texas, Sitting at El Paso, Texas, November Term, A. D. 1902.

W. W. SWEARINGEN
vs.
THE TEXAS & PACIFIC RY. CO. } No. 323.

Now comes the defendant herein, and leave of the court first asked and obtained, files this its first amended original answer, in lieu of its original answer, filed herein on the 3rd day of November, A. D. 1902, and so amending says:

1st.

That the matters and things set forth in plaintiff's first amended original petition, filed herein on the 11th day of November, A. D. 1902, are not sufficient in law to entitle plaintiff to recover anything of this defendant, and of this prays the judgment of the court.

2nd.

And defendant, saving its general exception above set forth, denies all and singular the allegations in plaintiff's first amended original petition, filed herein on November 11th, 1902, and says it is not guilty of the wrongs, injuries, and trespasses therein alleged, and of this it puts itself upon the country.

3rd.

And for special answer herein defendant says that if plaintiff was injured, as set out in his petition, which the defendant does not admit but denies, that said injuries were not caused by or through any negligence of defendant, its servants or employés, or any of them, and that it is not true that said track scale box was erected so near said track on which plaintiff was working at the time he was injured as to injure him or other employé of defendant, but that the same was and had been erected in a proper and safe manner and a proper and safe distance from said track, and that if plaintiff was injured as he alleges, which the defendant denies, it was by and through his own negligence in riding upon said car in a careless and negligent manner at the time and place he was so riding, and in not keeping a proper and careful lookout at said time.

4th.

And for further special plea herein, defendant says that if plaintiff was injured, as alleged in his petition, which defendant denies, that if said track scale box was so near said track on which plaintiff was working as to be dangerous to plaintiff and other employés working thereon, which defendant denies, plaintiff well knew, or could have known the same by the use of ordinary diligence, and assumed the risk arising therefrom in this: plaintiff has been in the employ of defendant, both as a switchman and brakeman, for a long period of time prior to the date of said accident, working on and about the switches and tracks of defendant in defendant's yards at El Paso, Texas, and about, on, and near the said track scale box and switch tracks near to and at the same, and especially on said track No. 2, on which plaintiff alleges the train of cars on which he was working, was, at the time he was injured, that said track No. 2 was a switching track, frequently used by plaintiff and other employés of defendant before and at the time of said accident, while engaged in the work of switching, placing and moving cars both day and night. That said track scale box is a large box or about six feet high and about five feet wide. That the same and the location thereof relating to said track is open and patent and obvious to the sight, and is not hidden or latent, all of which was well known to plaintiff, or could have been known to him by the use of ordinary diligence on his part and by the exercise of ordinary care on his part, plaintiff could have performed his duties as switchman without coming into collision with said track scale box. Wherefore plaintiff assumed the risk of the danger of said scale box and was injured, not by the negligence of defendant or its servants and employés, but by and through his own contributory negligence in not avoiding the collision with said track scale box.

16 5th.

And for further special plea herein defendant says that if plaintiff was injured as alleged in his petition, which defendant denies, that plaintiff well knew the situation and location of said track scale box in relation to said track No. 2, at the time and place he was working at the time of the accident, and assumed the risk arising therefrom. Wherefore defendant says that plaintiff was injured not through any negligence on its part, but by and through his own contributory negligence in riding upon the car in the manner in which he did ride at the time and place in which he was so riding, and in not using proper care in avoiding the collision with said track scale box, he well knowing the danger (if any) and that he was approaching same.

Wherefore defendant says that plaintiff should not recover anything of defendant, and of this it puts itself upon the country.

EDWARDS & EDWARDS,
Attorneys for Defendant.

(Indorsed:) No. 323. In the U. S. circuit court for the western district of Texas. W. W. Swearingen *vs.* Texas & Pac. Ry. Co. Defendant's first amended original answer. Filed this 12 day of Nov., 1902. D. H. Hart, clerk, by J. P. Hodgson, deputy.

Motion to Instruct Jury to Return Verdict for Defendant.

Filed November 13, 1902.

W. W. SWEARINGEN
vs.
THE TEXAS & PAC. RY. CO.

Now comes the defendant and moves the court to instruct the jury to render a verdict for the defendant.

EDWARDS & EDWARDS,
Att'ys for Def't.

(Indorsed:) No. 323. W. W. Swearingen *vs.* Tex. & Pac. Ry. Co. Motion of def't to direct jury to return a verdict for def't. Filed Nov. 13, 1902. D. H. Hart, clerk.

17 *Judgment.*

Entered November 14, 1902.

W. W. SWEARINGEN, Plaintiff,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant. } No. 323.

Now on this 12th day of November, A. D. 1902, came on for trial the cause above styled and numbered, and both parties, plaintiff and defendant, appeared, and both parties by their respective attorneys announced ready for trial; and thereupon came a jury of twelve good and lawful men of this western district of Texas, consisting of D. E. Doane and eleven others, who were duly qualified and sworn according to law to try the issues in this cause, and who after hearing all the evidence adduced by the parties and the arguments of the attorneys for both parties and the charge of the court, retired to consider of their verdict, and, after due deliberation, on the 14th day of November, A. D. 1902, returned into open court the following verdict, to-wit:

We the jury find for the plaintiff and assess his damages at seven thousand and five hundred ($7500) dollars.

D. E. DOANE, *Foreman.*

It is therefore considered, ordered, adjudged and decreed by the court that the plaintiff, W. W. Swearingen, have and recover of and from the defendant, The Texas & Pacific Railway Company, a corporation, said sum of seven thousand five hundred dollars ($7,500.00), together with interest thereon from this date at the rate of six per cent. per annum, and all his costs in this action laid out and expended, for all of which execution may issue; and further that the officers of this court may have execution against each of the parties to this suit for the costs made by each of them respectively.

18 *Motion for a New Trial.*

Filed November 15, 1902.

In the United States Circuit Court for the Western District of Texas, Sitting at El Paso, Texas, November Term, A. D. 1902.

W. W. SWEARINGEN
vs.
THE TEXAS & PAC. RY. CO. } No. 323.

Now comes the defendant and moves the court to grant defendant a new trial in this cause for the following reasons, to-wit:

1st. Because the court erred in overruling defendant's motion to

instruct the jury to return a verdict for defendant for the reason that the undisputed evidence showed that the said track scale box against which plaintiff struck was erected in a proper place and within a reasonably safe distance and location from track No. 2, on which track plaintiff was riding at the time he was hurt.

2nd. Because the court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant for the reason that the undisputed evidence showed that plaintiff knew of the location of the track scale box, and also knew of the location of track No. 2, on which track he was riding at the time he was hurt, with reference to the track scale box. That track scale box and the danger of the same was open and obvious to the view of plaintiff; that neither the same nor the danger of the same was latent or hidden from plaintiff, and plaintiff assumed the risks thereof.

3rd. Because the court erred in refusing to permit defendant to introduce in evidence the application of plaintiff made to defendant for employment, which application was offered by defendant for the purpose of showing plaintiff had notice of the said track scale box and that he might be injured by same unless he used care.

Wherefore defendant prays that the verdict and judgment in this case rendered on the 14th day of November, A. D. 1902, be set aside and a new trial granted to this defendant.

EDWARDS & EDWARDS,
Attorneys for Defendant.

(Indorsed:) No. 323. In the U. S. circuit court for the
19 west. dist. of Texas. W. W. Swearingen *vs.* Tex. & Pac. Ry. Co. Defendant's motion for a new trial. Filed Nov. 15, 1902. D. H. Hart, clerk.

Order Allowing Defendant to Amend Motion for New Trial.

Entered November 18, 1902.

W. W. SWEARINGEN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 323.

In this cause defendant, The Texas & Pacific Railway Company, is granted leave to amend its motion for new trial herein.

Defendant's First Amended Motion for a New Trial.

Filed November 18, 1902.

In the United States Circuit Court for the Western District of Texas, at El Paso, Texas, November Term, A. D. 1902.

W. W. SWEARINGEN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 323.

Now comes defendant and, after leave of the court first asked and obtained, files herein its 1st amended motion to the court to grant defendant a new trial in this case, for the following reasons:

1st. Because the court erred in overruling defendant's motion to instruct the jury to return a verdict for the defendant, for the reason that the undisputed evidence showed that the said track scale box against which plaintiff struck was erected in a proper place and within a reasonably safe distance and location from track No. 2, on which track plaintiff was riding at the time he was hurt.

2nd. Because the court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant, for the reason that the undisputed evidence showed that plaintiff knew of the location of the track scale box, and also knew of the location of track No. 2, on which track he was riding at the time he was hurt, with reference to the track scale box; that the track scale box and danger of the same was open and obvious to the view of plaintiff; that neither the same nor the danger of the same was latent or hidden from plaintiff, and plaintiff assumed the risks thereof.

3rd. Because the court erred in that portion of its charge to the jury, as follows: "Defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact and that by continuing the work, with such knowledge he assumed all risk incident thereto and arising out of his employment. Upon this point you are instructed that if you believe from the testimony that, prior to plaintiff's injuries, he knew of the existence and location of the scale box and the danger incident to the discharge of his duties while passing the same on a moving train, if danger there was, or if knowing of the location of the structure, the danger to the employés while in the usual discharge of their duties was apparent, that is open to observation, then you are instructed that the plaintiff, by continuing in the employment of the defendant, without complaint, assumed such risks, he would not therefore be entitled to recover. In this connection you are instructed that the mere fact that plaintiff knew of the existence and location of the scale box, would not, as a matter of law, charge him

with the knowledge of the danger, if such there was, due to its proximity to the north rail of track No. 2. And whether he knew of the danger is a question of fact for you to determine from the consideration of the facts and circumstances in evidence," as shown by defendant's bill of exception No. —. Because the rule of law stated in such paragraph was not applicable to the facts of this case, and was calculated to do great injury to the defendant.

4th. Because the court erred in refusing to permit defendant to introduce in evidence the application of plaintiff made to defendant for employment, which application was offered by defendant for the purpose of showing plaintiff had notice of the said track scale box and that he might be injured by same, unless he was careful.

Wherefore defendant prays that the verdict and judgment in this case rendered on the 14th day of November, A. D. 1902, be set aside and a new trial granted to this defendant.

EDWARDS & EDWARDS,
Attorneys for Defendant.

21 (Indorsed:) No. 323. U. S. circuit court, west. dist. of Texas. W. W. Swearingen *vs.* The Texas & Pac. Ry. Co. Defendant's 1st amended motion for new trial. Filed Nov. 18, 1902. D. H. Hart, clerk.

Order Overruling Defendant's Motion for New Trial.

Entered November 18, 1902.

W. W. SWEARINGEN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 323.

Now on this day came on to be heard the motion of the defendant, The Texas & Pacific Railway Company, to set aside the verdict and judgment rendered and entered herein on the 14th day of November, 1902, and to grant it a new trial of this cause, and the argument of counsel having been heard and duly considered, it is the opinion of the court that the said motion should be refused and in all things overruled, and it is accordingly so ordered.

Order Allowing Defendant 30 Days After Adjournment to File Bill of Exceptions.

Entered November 18, 1902.

W. W. SWEARINGEN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 323.

Upon the application of defendant, The Texas & Pacific Railway Company, it is ordered by the court that it have and is hereby

granted thirty (30) days from and after the adjournment of this court for the term, in which to prepare and file its bill of exception- herein.

22 *Defendant's Bill of Exceptions.*

Filed Dec. 17, 1902.

In the United States Circuit Court for the Western District of Texas, El Paso Division.

W. W. SWEARINGEN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 323.

Be it remembered, that upon the trial of the above cause in said court beginning on the 12th day of November, A. D. 1902, and ending on the 14th day of November, A. D. 1902, the following facts were established by the testimony introduced:

Facts About Which There is No Dispute.

That plaintiff at the time he was injured was a member of a switching crew in the employ of defendant, working in defendant's railroad yards in the city of El Paso, Texas.

That the crew was composed of L. C. Brown, engineer, and W. T. Butts, firemen, operating the switch engine, and R. P. Moore, yardmaster, and Frank I. Williams and W. W. Swearingen, plaintiff, switchmen.

That tracks Nos. one and two are switch tracks in said yards running parallel to each other and in an easterly and westerly direction.

That track No. 1 is called the weigh or scale track, and runs across the weighing or bed part of the scales, and is north of No. 2 track.

That the scales consist of two parts. One is a bed or weighing part built even with the ground and over which the rails of track No. one run. The other is the part which holds the balances to the scales, and is an upright structure, a little more than six feet high and about five feet wide, extending easterly and westerly along the tracks, and is painted a light green color, and is called the scale box. It is about 18 inches thick.

That the scale box is between tracks Nos. 1 and 2, and is just south of track No. 1 and north of track No. 2.

That the photograph of the scale box and cars, exhibited in plaintiff's testimony, is taken from a south view, and shows that part of the scale box fronting track No. 2, and the cars shown therein are on track No. 1, and north of the scale box.

23 That the switch engine while working in defendant's yards at El Paso always heads west, that is the front end is west, and the engineer's side of said engine is the north or right-hand side.

That the switchmen always work on the north or right-hand side of the switch engine or cars for convenience in signaling the engineer how to move the engine and cars.

That the oil box is a box which goes around the end of the axle of a car, and is under the body of the car.

Plaintiff testified in his own behalf as follows: I live in El Paso, Texas, and am thirty-two years old, and have been engaged in railroad work, as conductor, brakeman and switchman, for 14 years for different roads, and have never followed any other business.

I was employed as a brakeman by defendant, but was sometimes used as a switchman in defendant's yards at El Paso.

I had been working for defendant about six weeks when this accident occurred, but had been switching only seven days regularly.

I commenced working in the yards at El Paso regularly as a switchman on the 1st day of February, 1902, and worked as such until the 7th day of February, 1902, and was hurt on the evening of that day.

When I worked for defendant as a brakeman I had nothing to do in the way of switching in the yards.

I was hurt on the evening of the 7th of February, 1902, while working as a switchman after dark, at about 6 o'clock and 45 minutes.

I was a day switchman, but we worked until after dark.

My duties as a switchman were to assist in the moving, placing and switching of cars, coupling and uncoupling them, and making up trains, and generally to obey the order of Yardmaster Moore, under whom we were working, and my duties also required me to ride on the cars while they were being moved.

On this night we were making up a transfer to take to the Southern Pacific railway and the cars we were to get were on No. 2 track. My station was with the engine, called "following the engine." I worked up near the engine.

The engine was at the west end of the yards, west of track No. 2 with me with it, and it backed down east into No. 2 track, with me riding on the footboard at the east end of the engine, to get these cars, and we passed the scale box, although I did not see it, and reaching the cars I coupled the engine to them, and not getting a signal from the yardmaster, who was still farther east of me,
24 as was also the other switchman, Williams, I walked east down the string of cars about two car lengths, and getting the signal I passed the same to the engineer, and the engine and cars started up again going west so as to go out on another track, and as the cars started I got up on a box car to ride down past the switch at the west end of track No. 2, so as to throw the switch and let the train on another track.

There is a ladder on the side of a box car, and a step called a

stirrup under the ladder under the bottom of the car, and I was holding on to the ladder with my hands (illustrating by holding his hands above his head as if climbing a ladder), and my lantern was hanging on my right arm, and I was looking back east for a signal from the yardmaster, as it is my duty to do. I do not know whether he wanted to give one or not, but it is my duty to be on the lookout, although I do not have to look in his direction all the time, when my right shoulder struck the scale box, and I fell down between the scale box and the cars, and I was dragged and badly injured. We had probably 8 or 10 cars at the time, and I was riding properly and hanging out a little from the car, which is proper, and I was on the north side of the car, which is also proper so as to signal the engineer.

The scale box is about six feet high and four or five feet long and about one and one-half feet thick. Here is a photograph of it. (Witness shows the following photograph, which is shown to the jury.)

Photograph was offered in evidence and shown to the jury, and this photograph is sent up for inspection by the circuit court of appeals, by order of the presiding judge made under paragraph 4, rule XIV of the United States circuit court of appeals for the fifth circuit.

It is 47 and ½ inches from the north or nearest rail of track No. 2 to the scale box, but around the top of the scale box is a coping 2 and ½ inches wide, which reduced the distance to 45 inches.

I was riding either on a box car or a cattle car, I don't know which, and I don't know whether or not it was a standard gauge or not. The defendant's standard gauge car is 109 inches wide, and the track from the outside of one rail to the outside of the other rail is 62 inches; deduct that from the width of the car, and divide by two and you will have the distance a car stands out past the rail; that will make a car stand out past the rail to the side 23 and ½ inches.

There is a ladder on the side of the car which stands out
25 about three inches, which is the ladder on which I was holding with my left hand above my right, and had my foot in the stirrup, and was swinging out from the car possibly two and one-half feet, which position is customary and proper, when I hit the scale box, and I was knocked unconscious and did not regain consciousness until I was nearly home.

Three of my ribs was broken, my face, head and back lacerated, my right shoulder was hurt and made stiff, and I cannot use that arm without taking the other hand to it. The breaking of my ribs caused the cavity in my side, and a protrusion of my breast bone. My spinal column was dislocated, and is bent outward and to one side, and I can't support the weight of my body on it without a brace, which I have to wear all the time.

I was a strong man before I was injured, and earned from $75 to $150 per month. I cannot perform manual labor of any kind, and

it is utterly impossible for me to continue railroad work. I was two months in the hospital and suffered a great deal of pain, and do now unless I wear the brace.

I knew the location of the scale before I was hurt. I knew it was between tracks Nos. 1 and 2, but I did not know anything with reference to its proximity to track No. 2, and did not know it was dangerously close to track No. 2.

At the time I was hurt I had no knowledge of the distance between the scale box and No. 2 track.

I set cars on the scale on track No. 1 to be weighed, but I would be on the north side of the cars on track No. 1, and as the scale box is on the south side I could not see it. I had nothing to do with the scale box and had no business around it.

I first learned the exact distance between the scale box and the nearest rail of track No. 2 a few days ago, when I went down and measured it at your (referring to plaintiff's attorney) recommendation.

I was never warned about the danger of getting knocked off of cars by this scale box, and at the time I was hurt I was attending to my work, and thinking about my duties, and looking for a signal from the yardmaster, and was not thinking about the box. I did not see it immediately prior to the time I struck it.

The scale box was at the same place, when I struck it, as it was when I first went to work for defendant.

During the seven days I worked for defendant we never used this No. 2 track at the west end or near the scales, and I never saw a car on track No. 2 opposite the scales, and never had my attention called to the distance between the track and scale box.

26

I never measured or approximated the distance to it. Nothing ever occurred to attract my attention to it.

The scale boxes in El Paso on other roads are farther from the side track than these are.

On the Rock Island railroad they are 117 inches, on the Galveston, Harrisburg and San Antonio they are 168, and on the Atchison, Topeka and Santa Fe they are 130 inches.

Cross examination:

I first entered the service of defendant in January, 1900, as extra brakeman, and made one trip and resigned and then re-entered its service again in December, 1901, as a brakeman, and made about one dozen trips between El Paso and Toyah.

I first worked as a switchman for defendant in its yards at El Paso five days in January, 1902, that is two nights and three days and I can't remember whether we used this track No. 2 in switching at that time, although I know that I set cars on the scale track to be weighed at that time, but at such times I never noticed whether there were any cars on track No. 2 at or near the scale box.

If we were working on track No. 2 I would be on the north or

right-hand side of the track so as to signal the engineer, that is on the same side of the track as the scale box, but I do not remember whether we used track No. 2 at that time. I was extra switchman during those five or six days.

During this time I set the cars on the scale to be weighed but I never helped to clear track No. 2 of cars so that the weigher could get to the scale box to weigh them, and have no knowledge of such thing being done.

The man who does the weighing has to get on the south side of the scale box and between it and track No. 2 to do the weighing.

I know Frank Williams, and I went to work regularly for defendant in February, 1902, three or four days before he did, and I suppose he and I spotted some cars on the scale to be weighed a day or two days before I was hurt, but I do not remember that we had to have some cars on No. 2 track moved out of the way of the scale box so that the weighing could be done, and to the best of my knowledge this did not lead up to a conversation between him and myself as to how close the scale box was to cars on track No. 2, and that a man hanging on the side of a box car on track No. 2 would not clear the scale box, and I do not remember that we examined the scale box and distance to track No. 2.

27 To the best of my knowledge no such thing or conversation ever occurred.

I know it was necessary to let down a lid on the south side of the scale box so as to get at the balances to weigh the cars, and I knew that the scale box was there, and I knew the track was there, and I knew they were not very far apart, but how far apart I did not know.

During those seven days' work in February, I do not remember ever passing by the scale box on a car or otherwise on track No. 2.

There is a step called a stirrup just under the car below the ladder, and it is put there for your feet to be put in when riding on the side of a car, but I cannot say whether my feet were in it or not, and I can't say whether my feet were on the oil box or stirrup or not. If I had hold of the ladder with my hands, and my feet on the oil box or brake beam, it would bring my body closer to the car than if my feet were in the stirrup, because you cannot straighten your legs when your feet are on the oil box, but you can bend in your waist, and that will bring you closer to the car.

After I was hurt I was first carried to the depot, and a short time afterwards carried to my home.

I was unconscious all the time I was at the depot, and do not remember anything that was said or done there, and if I said anything there I did not know what I was saying, and I do not remember saying anything to Mr. Smith about I didn't know how I came to forget about the scale box, and I do not remember seeing Mr. Smith there. I did not recover consciousness until I was nearly home.

I knew we had to pass the scale box at the time I was hurt so as

to get to the switch beyond, but I was not thinking about it, and I did not see it when we passed it going in after these cars.

The switch engine had a headlight lighted at both ends and I was on the footboard at the rear of the engine, which put me in front while we were backing into track No. 2 after the cars, but the headlights were not very clean or bright.

There was nothing to hide the scale box from my view, it was perfectly open and apparent.

I was at the time I was hurt about five feet 11 inches in height, and strong, active and healthy.

28 Dr. H. E. STEVENSON, after qualifying as an expert physician and surgeon, testified in behalf of plaintiff as follows:

That plaintiff was seriously and permanently injured; that his spinal column was dislocated, and bent outward and to one side.

That two of his ribs had been broken, and his breast bone shoved out a little, and that his injuries absolutely incapacitated him from ever doing manual labor of any kind; that he could not support the upper part of his *duty* without a brace, and at any time a fall or sudden jar to his back would probably bring on an attack of myletis, a species of spinal meningitis, which disease would almost certainly result in death.

That the probabilities were that a man after receiving the injuries such as plaintiff had received would be unconscious for a longer or shorter period of time, but that it was not improbable that he would retain his mentality and speak rationally within a few minutes after receiving his injuries.

E. B. SMITH testified in behalf of plaintiff as follows:

I am superintendent of terminals for the defendant at El Paso, Texas, and have held such position for a little over four years, and the scale and scale box and side track No. 2 passing just south of it has been in the same place it now is and was at the time plaintiff was injured, for that length of time to my knowledge.

Cross-examination:

I heard of plaintiff getting hurt and went to the depot and saw him there within about ten minutes after he was hurt, and he was rational at the time, and I asked him how he came to forget about the scale box, and he answered that he did not know how he came to forget about it.

I have had twenty-five years' experience in train service, and it is not proper for switchmen to ride on the oil box or brake beam, with his feet. It is dangerous. There are ladders on the sides of the car for them to catch hold of and a stirrup just under them for them to put their feet in when they have to ride on a car.

It is four feet from the north or nearest rail of track No. 2 to the scale box, and a standard box car projects over the rails two feet on each side.

The ladders on the side of the car stand out about four inches which makes the distance from the ladders on a car on track No. 2 to the scale box 21 inches, and there is a coping around the
29 top of the scale box 1 and ½ inches wide, making the distance 19 and ½ inches to the ladder on the side of the car.

Track No. 2 is a switch track and comes near by and past the depot, and is in use every day for switching. It is the track most frequently in use at the west end of the yards.

The tracks are seventeen feet apart from center to center, that is it is 17 feet from the center of track No. 1 to the center of track No. 2. This is the customary distance between and is standard.

South of track No. 4 there is a space left for four or five more tracks.

Cross-examination by plaintiff:

A well developed man cannot safely pass by the scale box on track No. 2 while riding on the side of a car on the ladder if he hangs out from the car, he would have to get inside of 21 inches, and any one who knew the scale box was there could get by while riding on the ladder of the car. While riding on a car on the ladder the customary position of a switchman is to swing out from the car with his body.

Plaintiff knew the scale box was there, and I say that in a manner from what he said to me at the time he was hurt. I do not know of any one else getting hurt by the scale box.

The busiest part of our yards are at the west end around the depots and scale box, they being the transportation tracks, and all lay right there together. I have seen switchmen riding on the oil box and brake beam, and I have told them not to do it, but I never discharged any one for doing it.

Re-direct by defendant:

The depot platforms are built as close or closer than the scale box to the tracks as possible for convenience in facilitating the work there, and so are the coal chutes. The depot platform is north of the tracks, and the coal chutes have tracks both north and south of them. A man using proper care could safely pass the scale box while riding on the side of a car on track No. 2. I think on the night of the accident they were switching standard box cars.

30 ROBERT MYRTLE testified in behalf of the plaintiff as follows:

I am acquainted with Frank Williams and the plaintiff herein.

After plaintiff was hurt and had gotten out of the hospital, I was present when Williams and plaintiff had a conversation on San Antonio street in El Paso, Texas; I don't remember the exact date, in which conversation Williams stated to plaintiff that Mr. Brown

had made a report to defendant purporting to say that he (Brown) had overheard a conversation between Williams and plaintiff in which they were discussing the closeness of the scale box to track No. 2, and that it would not clear a man, and the company wanted him (Williams) to make a report about it, and he could not make such a report because no such conversation occurred between him and plaintiff.

Cross examination:

We three were facing the street at the time. Plaintiff was on the left and Williams in the center, and I was on Williams' right, and was in about two feet of them, and Williams was talking to plaintiff. I do not remember anything of what plaintiff said. I might possibly be mistaken about what Williams said, but I have stated it as I remember it.

Here plaintiff rests.

FRANK I. WILLIAMS testified in behalf of defendant as follows:

Plaintiff and myself worked together switching in the yards at El Paso at the time he was hurt. I went to work there as a switchman about three days before the accident, and after I went to work and up to the time plaintiff was hurt we worked on track No. 2, every day, and we worked there the day he was hurt. He was there doing his part of the work.

Either two days or the day before the accident plaintiff and myself had a conversation about the scale box not clearing a man riding on the side of a car on track No. 2.

The conversation came up because we had set some cars on the scales on track No. 1 to be weighed, and had to move some cars off of track No. 2 so that the weigher could let the lid down and weigh them, and while we were having this conversation plaintiff and myself looked at the scale box, and talked about its not clearing
31 a man. Plaintiff helped to remove the cars. I don't remember the words we used, but the conversation was in regard to a man not clearing the scale box.

Plaintiff worked on that track with me and the others, and I saw him every day about the scale box, although I cannot say positively that I ever saw him pass the scale box on a car.

I found out that the scale box would not clear a man riding on the side of a car the first day I went to work there, unless he was careful and used precaution, although no one ever told me of it. It is a large object and easy to be seen.

Cross examination:

I think I first told about having this conversation the next day after plaintiff was hurt, and I told it to the parties I was working

with, Engineer Brown, Fireman Butts and Mr. Moore. I am not certain that Butts was present, but I know Brown overheard me telling about the conversation, because he reported to the defendant that he had heard me say I had had the conversation above referred to with plaintiff.

I made a report to the defendant stating I had had the conversation with plaintiff, at their request.

I don't remember that I ever went with Mr. Myrtle to the hospital after plaintiff was injured to see plaintiff, and I don't think I ever stated to plaintiff in Myrtle's presence either at the hospital or anywhere else that Brown had stated to the defendant that he had heard that plaintiff and myself had had such a conversation, and that the defendant wanted me to make a report about it, and that I could not because no such conversation had occurred between myself and plaintiff about the scale box not clearing a man. I don't remember ever telling plaintiff after he got out of the hospital when he was by himself or with any one else that Brown had made such a report to defendant and defendant wanted me to make such a report also, and I could not do it because no such conversation had occurred between us as to the scale box.

Re-direct:

I had had the conversation with plaintiff before he was injured about the scale box not clearing a man, and when I saw plaintiff after he was injured I told him that Brown had reported to defendant that he heard me say we had had such a conversation, and I was complaining to plaintiff that Brown had reported hearing me say that such conversation had taken place, but I never told plaintiff or any one else that such conversation had not taken place.

32 W. T. BUTTS testified for defendant as follows:

I was employed by defendant as a fireman firing the switch engine at the time plaintiff was hurt, and had been doing that work for some time before.

Just before the accident the engine, which was headed west, backed down from the west into track No. 2 to get a string of cars to take to the Southern Pacific railway.

We backed down track No. 2 past the scale box and coupled to the cars, and were going back west again, when after we passed the scale box the second time, the engineer missed plaintiff's lantern light and said, I am afraid plaintiff has been scraped off by the scale box, and I got off and went back and found him at the scale box, between the scale box and the track.

We had worked on that track at the west end several times before this time that day, and plaintiff was working with the engine doing what is called following the engine. He works on the north side of the track or cars, and on track No. 2 that would be the side next to the scale box.

I have often seen plaintiff working on that track before the accident. I have seen him pass the scale box on a car several times and seen him lean in and dodge it.

The way I came to see him was, I would get through putting in a fire, and having nothing else to do, I would come over to the engineer's side of the engine and lean out and watch the switchmen at work.

I found out right away after going to work that a man would not clear the scale box passing on the side of a car unless he was careful, by seeing the switchmen lean in and dodge it.

Cross examination:

When I first reached plaintiff after he was hurt, he was unconscious and only groaned a little, and we then took him up and carried him into the depot, and he became conscious and talked to those around him. He may have been irrational at the time, but I do not think he was, as he talked rationally.

We also worked on track No. 4 that day, and we worked on track No. 1 quite a lot, and we worked both at this end (west end) and the east end of track No. 2 that day. I can't say how often I have seen plaintiff pass the scale box, but several times each day.

33 S. M. WEST testified for defendant as follows:

I am scale inspector for the defendant, and have held that position for about fifteen years.

My duties are to attend to the building and repairing and inspecting of scales for defendant.

I built the scales here at El Paso in 1892, and there has been no change in their location since then; they are standard scales.

The scale box is where the weighing lever for the scales are and is about six feet high and seven feet in length with the track.

There is a door in the scale box on the south side, which door is 21 inches wide and opens towards track No. 2, and you have to open this door to get at the weigh beam.

It is my business to know how much a car passing on a side track will clear the scale box, and these tracks at this place are standard gauge apart, and the scale box is standard, and as I had to put the scale box there to facilitate business and for convenience, I had no more room because the lever of the scale is a certain length to get the fulcrum. The tracks are standard, and are not farther apart because there is no more room to put them farther apart.

The scale box is 48 inches from the north rail of track No. 2, and the ladders on a car stand out about three inches, and the car extends over the rail two feet.

The stirrup is a step on the car under the ladder and under the car fastened to the sill, and is even with the outside edge of the car. The oil box is the axle of the car. The stirrup is about 36 or 37 nches from the ground, and the oil box is lower, that is, closer to

the ground, and the brake beam is also lower than the stirrup, both the oil box and brake beam are up under the car.

Neither the oil box or the brake beam are put on the car to be ridden on with the feet, but the switchmen use them for that purpose all the time. I have seen them do it a thousand times in the El Paso and other yards of defendant.

A man holding on to the ladder with his hands and with his feet either on the oil box or brake beam would have the upper part of his body thrown out much farther from the car than he would if he was holding to the ladder and had his feet in the stirrup. The stirrup is put on the car for the feet to go in when riding on it.

When holding to the ladder, with the feet on either the oil box or brake beam, the body is thrown out at right angles to the car, whereas, when standing in the stirrup with the feet and
34 holding to the ladder the body is upright along the side of the car. In the first position you can't get close to the car because the stirrup is in the way.

I tested a car on this side track when I put in the scale, and I also tested one again to-day. I stood in the stirrup and held to the ladder and I cleared the scale box about six or eight inches. I then held to the ladder and put my feet on the oil box and — that position swung my body out so far that my head and shoulders would hit the scale box.

The distance that I put this scale box from track No. 2 is standard, and is considered a safe and proper distance in putting in scales where the tracks are standard gauge apart. It is safe unless a man is swinging out with his feet under the car on the oil box or brake beam, and neither of these are put there to be ridden on.

Cross examination:

We take into consideration the swinging of cars in running while passing the scale box when placing these scales.

I am bound to put my scales in according to the length of the lever, and if tracks are already there and are standard distance apart I have a uniform and standard distance from the tracks.

We have side tracks at most places on each side of the scales. The tracks in this yard are standard gauge apart, and where ground is scarce we have to economize in space, but where ground is plenty the tracks can be further apart.

The scales are sixteen inches from the side of a car on the side track at Shreveport Junction, 21 inches at Dallas, about 22 inches at Texarkana. In Jefferson there is no side track at that side. At Pecos City the scale is a joint one owned by the defendant and the Pecos Valley railroad, and stands on joint ground where there is plenty of room.

Re-direct:

The standard width between switching tracks in the yards is 14 and 14 & ½ and 15 feet apart from center to center.

It is necessary to put the scales in among the switching tracks for convenience in working and saving time, and in all yards where there is limited space experience gives a standard distance to put the scales between the tracks which is considered safe, and as an expert in the business the way I put in this scale and the location and the distance is safe.

35 Re-cross examination:

I did not have a lantern on my arm when I tested this car to-day. A lantern is about eight inches in circumference, but I do not think it would throw a man out from a car any farther if he had one on his arm while hanging on the ladder.

R. P. MOORE testified in behalf of defendant as follows:

I was yardmaster for defendant at the time plaintiff was hurt, and still hold such position, and was working with him at the time he was hurt, and he was under my orders.

I know the location of the scale, and I can safely say that I found out that it would not clear a man hanging on the side of a car on track No. 2, unless he was careful, within a week after I went to work there. I have been working there four years. A man can pass the scale box, but he must use precaution. I have passed it safely. I possibly, I cannot say as a certainty, found out that a man could not pass the scale box unless he used care, the first time I went on track No. 2.

We weighed cars while plaintiff was working there, and I have seen plaintiff often within six, eight or ten feet of the scale box, although I do not remember that I ever saw him pass it.

Cross examination:

No one ever told me of the scale box. I noticed it myself and am always on the lookout for it.

If a man in passing the scale box on the ladder of a car swings out he will strike it. To clear it he must hug the car.

We employ a code of signals by means of a lantern to do switching at night, and it is proper for a switchman to look out for signals from the others, and it is proper for a switchman to ride on the ladders of a car. It is a common practice for switchmen to put their feet on the oil box and grab hold of the ladder while switching, and in my judgment there is no more danger in putting your feet on the oil box and catching the ladder to ride than there is in putting your feet in the stirrup and holding the ladder. The stirrup is not in the way of the feet or legs when riding with the feet on the oil box and holding the ladder.

36 Dr. A. L. JUSTICE, after qualifying as a competent physician and surgeon, testified for defendant as follows:

I am surgeon for the defendant at El Paso, Texas, and I was called to see plaintiff at the time he was injured, and when I reached him, he was still at the depot, it was a very short time after he was hurt. This was before he was taken home. He was not unconscious, and was talking and answering questions rationally.

Cross examination:

He was suffering a great deal of pain, and at the moment he was injured he must have received a severe shock, but to the best of my belief he was not unconscious.

The defendant then produced and showed to the plaintiff his written application to defendant company for employment as a brakeman signed by plaintiff and dated February 22, 1900, and plaintiff testified that he had read the same at the time he made it, and had written the answers thereto himself to the questions therein asked him, and had signed it. Defendant then offered in evidence the following portions of said application, consisting of questions and the answers thereto written by the plaintiff, for the purpose of showing that plaintiff had notice of the location of said track scale box, and that he was in danger of being knocked off of a car when passing the same:

Question. "Do you make this application for employment in train service, realizing the hazardous nature of such employment, understanding that it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, track scale boxes, water tanks, coal houses, platforms, sheds, roofs and other overhead and side structures, and that in performance of the duties for which you are employed you are liable to receive injuries by being knocked off the side or top of cars, unless you use due care to avoid injury thereby?"

Answer. "Yes."

Question. "Do you agree to acquaint yourself with the location of all overhead and truss bridges, as well as the location of all other structures along the line of the road?"

Answer. "Yes."

Question. "Do you understand that no officer or employé of this company is authorized to request or require you to use de-

37 fective tracks, cars, machinery or appliances of any kind, and that when you do so you assume all risk of injury therefrom?".

Answer. "Yes."

Question. "Do you understand that this company desires to employ only experienced men in the service, and does not undertake to educate inexperienced men?"

Answer. "Yes."

Counsel for plaintiff objected to the said testimony for the reason that it was irrelevant and immaterial, and that plaintiff had made this application and entered the employ of defendant, and afterwards resigned, and again entered the employ of the defendant some two years later, without making another application, and also because it was an effort on the part of defendant to limit its liability for its own negligence, and void as against public policy, and because the particular location of this track scale box is not given; and the court having sustained plaintiff's objections and excluded said testimony, the defendant then and there excepted to the action of the court in excluding said evidence, and tenders this, its bill of exception-, which is allowed, signed and sealed by the court.

The above and foregoing being a statement of all the facts in evidence, before the jury had retired, under the charge of the court, the defendant requested the following special charge.

W. W. SWEARINGEN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 323.

The testimony for both parties being concluded, the defendant asks the court to charge the jury to return a verdict for the defendant.

EDWARDS & EDWARDS,
Attorneys for Defendant.

Which charge was refused by the court, and the defendant then and there excepted, before the jury retired, to the action of the court upon the same, at the time of the refusal thereof, and tenders this bill of exceptions, which is allowed, signed and sealed by the court; and thereupon the court charged the jury as follows:

38 United States Circuit Court, Western District of Texas, El Paso Division.

W. W. SWEARINGEN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 323. At Law.

Charge of the Court.

GENTLEMEN OF THE JURY: The plaintiff has brought suit to recover damages of the defendant on account of injuries received by him while engaged in the discharge of his duties as acting switchman in the El Paso yards of the defendant.

It is claimed, in effect, by the plaintiff that his injuries grew out of the negligence of the defendant in constructing and maintaining a set of track scales so near to the adjoining railway track as to be un-

safe and dangerous for employés who were required to do switching duty in the yard; and that while he was engaged in a proper manner in the discharge of his duties on one of the cars of the defendant which was passing the scales, he came in contact with the scale-box, was thrown to the ground and seriously injured.

In reference to the duty of a railway company, or master, to employés, the law requires the company to exercise reasonable care in furnishing suitable structures around and about which the employés are to work, so that they may be reasonably safe for use by the employés. The duty of the railroad company in that respect to its employés is discharged when, and only when, its agents, whose business it is to build and erect such structures, exercise due care, as well in their original construction as in keeping and maintaining them so as to be reasonably safe for use by the employés. A master employing a servant impliedly engages with him that the structures around and about which he is to work shall be reasonably safe. It is the master who is to provide the place and the structure, and when he employs one to enter into his service, he impliedly says to him that there is no other danger in the place and structure than such as is obvious and necessary. Of course some places of work, looking to the structure around and about which the employé is to discharge his duties, are more dangerous than others but that is something that is inherent in the thing itself—it is a matter of necessity, and cannot be obviated. And within such limits, the master who provides the place and the structure owes a positive duty to his employé
39 whose duties require him to work around and about the same. That positive duty does not go to the extent of the guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured, or the reasonable precautions therefor taken. He has the right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in that respect. See 152 U. S. 688; 135 U. S. 570; 122 U. S. 195.

It was, then, the duty of the defendant, in constructing and maintaining its track scales, to use reasonable precautions to secure the safety of its employés whose duty required them to work around and about the same. If you believe from the testimony that the track scales in question were so constructed, in reference to their proximity to north rail of track No. 2 (the track on which plaintiff was riding at the time he was hurt), as to be reasonably safe for employés whose duties required them to work around and about the same, the plaintiff in that event cannot recover, whatever may have been the cause of the accident; for, if the scales were so constructed, in the respect mentioned, as to be reasonably safe for the employés of the defendant, the latter has done all that the law required it to

do touching its duty in furnishing to its employés reasonably safe appliances and structures. If, however, you believe from a consideration of the evidence, that the defendant failed to exercise reasonable care and caution in the construction and maintenance of such scales; that the same were unsafe and dangerous for employés because the scale box was erected too close to the north rail of track No. 2; and that from such want of care on the part of the defendant the injuries of the plaintiff resulted, your verdict in that event should be for the plaintiff—unless you find against him on the ground of contributory negligence, or assumed risk, as to which you will be hereinafter instructed. The defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact, and that by continuing in the work with such knowledge, he assumed all risks incident to and arising out of his employment. Upon this point you are instructed that if you believe from the testimony that, prior to the plaintiff's injuries, he knew of the existence and location of the scale box, and the danger incident to the discharge of his duties while passing the same
40 on moving train, if danger there was; or if, knowing of the location of the structure, the danger to the employés while in the usual discharge of their duties was apparent, that is open to observation, then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks and he would not, therefore, be entitled to recover. In this connection, you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box would not, as a matter of law, charge him with a knowledge of the danger, if such there was, due to its proximity to the north rail of track No. 2; and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence.

The defendant also contends that the plaintiff was guilty of negligence which contributed to his injuries, and hence that he is precluded from recovery. The law requires the plaintiff to exercise that degree of care which a person of ordinary prudence would have exercised under similar circumstances, to prevent harm or injury to himself. If, therefore, he failed to exercise such degree of care in looking out for his own safety, whether in respect of the position of his feet while standing on the side of the car when hurt, or in any other respect whatever, and such want of care on his part contributed to the injuries of which he complains, then he is not entitled to recover, and your verdict should be for the defendant.

You are further instructed that as the plaintiff charges negligence on the part of the defendant, it is incumbent upon him to establish, by proof, negligence as alleged; and hence if the injuries of the plaintiff were the result of mere accident, without fault or negligence on the part of the defendant, then no recovery can be had by the plaintiff.

You are the exclusive judges of the credibility of the witnesses

and of the weight to be given to their testimony, and you will attach to it as much weight as under all the circumstances you think it entitled to receive.

If your verdict be in favor of the plaintiff, you will award him such amount of actual damages as will reasonably compensate him for the injuries he has sustained; and, in arriving at that sum, you will take into consideration the character of his injuries, whether permanent or otherwise, and his diminished capacity, if any, to earn money in consequence of such injuries, as well as for the pain and suffering he may have endured, or shall endure, in consequence of the same.

If your verdict be for the plaintiff, you will return it in the following form:

" We, the jury, find for the plaintiff and assess his damages
41 at.....dollars," you to fill up the blank with the amount found.

If, on the other hand, your finding be in favor of the defendant, you will simply say:

" We, the jury, find for the defendant."

T. S. MAXEY, *Judge.*

And to the following portion of said charge of the court given to the jury: " The defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact, and that by continuing in the work, with such knowledge, he assumed all risks incident to and arising out of his employment. Upon this point you are instructed that if you believe from the testimony that, prior to plaintiff's injuries, he knew of the existence and location of the scale box, and of the danger incident to the discharge of his duties while passing the same on a moving train, if danger there was; or if, knowing of the location of the structure, the danger to the employés while in the usual discharge of their duties was apparent, that is, open to observation, then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection, you are further instructed that the mere fact that the plaintiff knew of the existence and the location of the scale box, would not, as a matter of law, charge him with knowledge of the danger, if such there was, due to its proximity to the north rail of track No. 2; and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence,"—the defendent then and there before the jury had retired, in open court, excepted, because the rule of law stated in such paragraphs is not applicable to the facts of this case and was calculated to do great injury to the defendant; and the court then and there overruled said exceptions to the charge, and the defendant tenders its bill thereof, which is allowed, signed and sealed by the court.

And thereupon the jury retired and after considering returned a

verdict, which is copied in the judgment in this case, and thereupon the court rendered judgment against the defendant; and thereafter the defendant moved the court on the ground stated in its motion for a new trial, contained in this record herein, to set aside said judgment, and the said motion was overruled by the court, and now tenders this its bill of exceptions hereinbefore fully stated,
42 and asks that the same be allowed, signed and sealed by the court and filed as a part of the record in this case.

EDWARDS & EDWARDS,
Attorneys for Defendant, Texas & Pacific Railway Company.

Signed this 15 day of December, A. D. 1902.
T. S. MAXEY, *Judge.*

(Indorsed:) No. 323. In the United States circuit court for the western district of Texas, at El Paso. W. W. Swearingen *vs.* Texas & Pacific Railway Company. Defendant's bill of exceptions. Filed this 17 day of Dec., 1902. D. H. Hart, clerk, by J. P. Hodgson, deputy.

Motion for Order to Send Up Original Paper.

Filed December 17, 1902.

In the Circuit Court of the United States for the Western District of Texas, El Paso Division.

W. W. SWEARINGEN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 323.

To the Honorable T. S. Maxey, judge of said court:

Defendant respectfully shows to the court that the photograph introduced in evidence cannot very well be copied into the printed record of this case, and prays the court to make an order that the photograph be sent up as an original paper for inspection by the circuit court of appeals for the 5th circuit.

Respectfully submitted,
EDWARDS & EDWARDS,
Attorneys for Defendant.

(Indorsed:) No. 323. W. W. Swearingen *vs.* Tex. & Pac. Ry. Co. Motion for order to send up original paper. Filed this 17th day of Dec., 1902. D. H. Hart, clerk, by J. P. Hodgson, deputy.

43 *Order to Send Up Original Paper.*

Entered December 17, 1902.

In the Circuit Court of the United States for the Western District of Texas, El Paso Division.

W. W. SWEARINGEN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 323.

Upon motion of the defendant, it appearing to the court that the photograph in evidence in this case cannot be copied into the printed record on writ of error in this case, it is ordered that said original photograph, which is attached to this order, be sent by the clerk of this court to the clerk of the circuit court of appeals, 5th circuit, at New Orleans, Louisiana, to be filed and preserved by him with the record taken up on writ of error in this case, and presented with said record to the said circuit court of appeals for inspection by that court upon the hearing of said writ of error.

The clerk will duly enter this order of record at the El Paso division of the court. Ordered at San Antonio, Texas, Dec. 15, 1902.

T. S. MAXEY, *Judge.*

Assignment of Errors.

Filed December 17, 1902.

Assignment of errors.

In the United States Circuit Court for the Western District of Texas, at El Paso, Tex.

W. W. SWEARINGEN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 323.

Now comes the defendant, The Texas & Pacific Railway Company, by counsel, and says that in the record and proceedings in the above entitled cause there is manifest error, in this, viz:

1st. The trial court erred in refusing to permit defendant to introduce in evidence portions of the written application for employ-
44 ment as a brakeman on defendant's railroad, made by plaintiff to defendant on February 22nd, 1902, as shown by defendant's bill of exceptions; because said testimony was material to defend-

ant, in this: that the questions asked plaintiff in said application, and the answers made thereto by plaintiff, show that plaintiff had notice of the location of the track scale box, and that he was in danger of being knocked off a car in passing same.

2nd. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant, because the undisputed evidence established that said track scale box was erected in the defendant's yard and under the circumstances in a reasonably safe place and at a reasonably safe distance and location from track No. 2, on which track plaintiff was riding at the time he was injured.

3rd. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant because plaintiff testified he knew of the location of the track scale box, and the location of track No. 2 with reference to said track scale box, on which track No. 2 he was riding at the time he was hurt, and because the undisputed evidence shows that the track scale box and the danger of same was open and obvious to the view of plaintiff, and that neither the track scale box or the dangers thereof were hidden or latent, and plaintiff was presumed to know the danger and assume the risks thereof.

4th. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant for the reason that the entire and uncontroverted testimony established the fact that plaintiff knew of the location of the track scale box, and location of said track No. 2, with reference to said track scale box, on which track he was riding at the time he was hurt, and that the track scale box, and the dangers of the same, was open and obvious to the view of plaintiff, and not hidden or latent, and plaintiff was presumed to know the dangers and assumed the risks.

5th. Because the trial court erred in the following portion of its charge to the jury:

"The defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact, and that by continuing in the work, with such knowledge, he assumed all risks incident to and arising out of his employment. Upon this point you are instructed that if you believe from the testimony that prior to the plaintiff's injuries he knew of the existence and location of the scale box, and of the danger incident to the discharge
45 of his duties while passing the same on a moving train, if danger there was; or, if knowing of the location of the structure, the danger to the employés while in the usual discharge of their duties was apparent, that is open to observation, then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box, would not, as a matter of law, charge him with knowledge of the danger, if such there was, due to its

proximity to the north rail of track No. 2, and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence."

Because the proof showed that plaintiff knew of the location of the track scale box, and of track No. 2, on which he was riding at the time he was hurt, in reference to said scale box, and that the same and the location thereof was open and obvious to plaintiff's view, and being an experienced brakeman, he was charged with notice that riding on the cars as he did was dangerous, and he assumed the risks thereof, and the court should have so charged the jury.

EDWARDS & EDWARDS,
Attorneys for Defendant, The Texas & Pacific Railway Company.

(Indorsed:) No. 323. In the United States circuit court for the western district of Texas, at El Paso. W. W. Swearingen *vs.* Texas & Pacific Railway Company. Assignments of error. Filed this 17th day of Dec. 1902. D. H. Hart, clerk, by J. P. Hodgson, deputy.

46 *Petition for Writ of Error.*

Filed Dec. 17, 1902.

In the United States Circuit Court for the Western District of Texas, at El Paso, November Term, 1902.

W. W. SWEARINGEN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 323.

Petition for writ of error.

To the judge of the circuit court of the United States in and for the western district of Texas, at El Paso:

Your petitioner, The Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an act of Congress of the United States, respectfully represents:

That in said term of this court, plaintiff, W. W. Swearingen, recovered against petitioner a judgment in the sum of seven thousand five hundred ($7,500.00) dollars, besides cost of suit, in the proceedings for the recovery of which, and in the rendition of said judgment, there was and is error to the great prejudice and damage of petitioner.

Petitioner represents that plaintiff, W. W. Swearingen, and his attorney of record, R. V. Bowden, reside in the city and county of El Paso, State of Texas.

Petitioner further represents that it has filed in this court its assignment of errors, and here presents the same for the inspection of the court. Defendant prays after inspection thereof that it be granted a writ of error to remand said judgment, and proceedings had in said cause, to the United States circuit court of appeals for the fifth circuit, whose future sessions are fixed to be held in the city of New Orleans, State of Louisiana, for revision and reversal, and in duty bound will ever pray, etc.

EDWARDS & EDWARDS,
Attorneys for Petitioner.

Granted this 15 day of December, A. D. 1902.

T. S. MAXEY, *Judge.*

(Indorsed:) No. 323. In the United States circuit court
47 for the western district of Texas, at El Paso. W. W. Swearingen *vs.* Texas & Pacific Railway Company. Petition for writ of error. Filed this 17th day of Dec. 1902. D. H. Hart, clerk, by J. P. Hodgson, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between W. W. Swearingen, plaintiff, and The Texas & Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said Texas & Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at the city of New Orleans, Louisiana, within thirty days from the date hereof, in the said United States circuit court of appeals, to be then and there held, *and* the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 15th day of December, in the year of our Lord one thousand nine hundred and two.

D. H. HART,
Clerk U. S. Circuit Court, Western District of Texas,
[SEAL.] By J. P. HODGSON, *Deputy.*

Allowed this the 15th day of December, 1902.

T. S. MAXEY,
United States Judge.

(Indorsed:) No. 323. W. W. Swearingen *vs.* Texas & Pa-
48 cific Railway Company. Writ of error. Filed this 17th day of Dec., 1902. D. H. Hart, clerk, by J. P. Hodgson, deputy.

Writ of Error Bond.

Filed December 17, 1902.

Know all men by these presents, that we, the Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an act of Congress of the United States, as principal, and C. R. Morehead and J. C. Lackland, as sureties, are held and firmly bound unto W. W. Swearingen in the full and just sum of ten thousand and no/ * * * ($10,000.00) dollars, to be paid to the said W. W. Swearingen, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, using scrolls, and dated this 12th day of December in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a term of the circuit court of the United States for the western district of Texas, at El Paso, in a suit pending in said court, between W. W. Swearingen, plaintiff, and The Texas & Pacific Railway Company, defendant, numbered 323 on the docket of said court, a judgment was rendered against the said Texas & Pacific Railway Company, on the 14th day of November, 1902, that the plaintiff by his suit recover of the defendant the sum of seven thousand five hundred and no/dollars, with six per cent. per annum interest from November 14th, 1902, as well as all costs of suit, and the said The Texas & Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said W. W. Swearingen and his attorney of record, R. V. Bowden, citing and admonishing him to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Texas & Pacific Railway Company shall prosecute its writ of

error to effect, and answer all damages and costs if it fail to
49 make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By PEYTON F. EDWARDS,
Att'y and Agent for said Company. [SEAL.]
C. R. MOREHEAD. [SEAL.]
J. C. LACKLAND. [SEAL.]

Sealed and delivered in presence of:
L. M. TURNER.
G. D. FEARY.

Approved this the 15th day of December, 1902.

T. S. MAXEY,
United States Judge.

(Indorsed:) No. 323. W. W. Swearingen *vs.* Texas & Pacific Railway Company. Bond. Filed this 17th day of Dec., 1902. D. H. Hart, clerk, by J. P. Hodgson, deputy.

THE UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The President of the United States to W. W. Swearingen and R. V. Bowden, his attorney of record, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals, for the fifth circuit to be holden at the city of New Orleans, Louisiana, within thirty days from the date hereof, pursuant to a writ of error sued out and filed in the clerk's office of the circuit court of the United States for the western district of Texas, at El Paso, in the cause wherein The Texas & Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Texas & Pacific Railway Company, plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of December, in the year of our Lord one thousand nine hundred and two.

Attest: D. H. HART, *Clerk*,
[SEAL.] By J. P. HODGSON, *Deputy*.

50 Signed this the 15th day of December, 1902.

T. S. MAXEY,
United States Judge.

We acknowledge service of the foregoing citation, this 19th day of December, A. D. 1902.

R. V. BOWDEN,
Attorney for W. W. Swearingen, Defendant and Respondent.

(Indorsed :) No. 323. W. W. Swearingen *vs.* Texas & Pacific Railway Company. Citation. Marshal's return. Filed this 17th day of Dec., 1902. D. H. Hart, clerk, by J. P. Hodgson, deputy.

Clerk's Certificate.

THE UNITED STATES OF AMERICA,
Western District of Texas.

I, D. H. Hart, clerk of the circuit court of the United States for the western district of Texas, do hereby certify that the foregoing sixty-one (61) pages contain a true and correct copy of the proceedings had in cause No. 323, entitled W. W. Swearingen *vs.* The Texas & Pacific Railway Company, as the same appear on file and of record in this office. And I further certify that the original writ of error and the original citation in error are included in said transcript, numbered 58 and 61 respectively.

Witness my official signature and the seal of said circuit court, at office in the city of El Paso, Texas, this the 3rd day of January, A. D. 1903.

[SEAL.]

D. H. HART,
Clerk of said Circuit Court.

51 THE TEXAS & PACIFIC RAILWAY CO.
vs.
W. W. SWEARINGEN. } No 1219.

MARCH 9, 1903.

On this day this cause was regularly called and was submitted to the court upon record and briefs filed.

THE TEXAS & PACIFIC RAILWAY CO.
vs.
W. W. SWEARINGEN. } No. 1219.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Texas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause, be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ of error bond herein, C. R. Moreland and J. C. Lackland, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

April 7, 1903.

52 Filed April 7, 1903. Charles H. Lednum, Clerk.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1902.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
W. W. SWEARINGEN, Defendant in Error. } No. 1219.

Error to the circuit court of the United States for the western district of Texas.

Before Pardee, McCormick, and Shelby, circuit judges.

Statement of the Case.

W. W. Swearingen, the defendant in error, instituted this action in the State court for El Paso county, Texas, from which court it was duly removed by the plaintiff in error, to the circuit court.

The pleadings of the plaintiff below present substantially the following allegations: That the defendant owns and operates a line of railway running into the city of El Paso, where it has tracks and switches constituting a general switch-yard for the handling, switching and shifting of both passenger and freight cars; that on and prior to the 7th day of February, 1902, he was in the employ of plaintiff in error as a switchman, working in its switch-yard in the city of El Paso, and his duties were to couple and uncouple cars, shift switches, and assist in the placing, switching and shifting of cars on the various tracks in the switch-yard, which cars were moved by means of a locomotive; that he was under the direction and supervision of another servant of plaintiff in error called a yard-master; that on the 7th day of February, 1902, while engaged in the performance of his duties, he was riding on the ladder on the side of a certain freight car of a train of cars attached to the locomotive, which ladder is placed there for employés to ride on while working, and which train of cars were going in a westerly direction along track No. 2 of the switch-yards; that his body was swinging slightly out from the car, in the proper and usual position to ride on the ladder; that the yard-master was at the east end of the train of cars directing their movements by means of a lantern,

53

it being in the night time, and plaintiff below was looking back for signals as was his duty, when he came in contact with the scale box structure which had been negligently placed by plaintiff in error, or permitted to remain, so near the north line of the track as not to permit the passage of his body in the position in which he was riding, and he was thrown to the ground and dragged along by the cars and permanently injured; that the scale structure was of a permanent character, and had been at the same place for many months prior to the time he received his injury, and had been placed there and maintained and used by the plaintiff in error, or was permitted to remain there, plaintiff in error knowing or could have known by the use of ordinary care the location of it, and it was during all the time, so close to the north rail of the track as to endanger the life and limb of defendant in error and other employés while engaged in their duties, and constituted a dangerous obstruction to the track; all of which was well known to plaintiff in error, or could have been known by the use of ordinary care, but it was unknown to the defendant in error; that in placing the scale structure or permitting it to remain at the place above recited, the plaintiff in error was guilty of negligence, and the defendant in error received his injuries by reason of said negligence, for which he claims damages.

The defenses were, first: General demurrer. Second: General denial. Third: The special plea that the defendant in error's injuries were not caused by the negligence of the plaintiff in error; that the scale structure was not erected so near the track as to injure the defendant in error, but the same was erected in a proper and safe manner, at a safe and proper distance from the track, and that the defendant in error was injured through his own negli-
54 gence and the careless manner in which he rode on the cars. Fourth: That if said scale box structure was erected so near the track as to be dangerous to the defendant in error, he knew it, or could have known it by the use of ordinary care, and assumed the risk arising therefrom, in this that he had been in the employ of the plaintiff in error both as a switchman and brakeman for a long time prior to the accident, and had worked in the yards and on the switches and on the track No. 2, on which he was injured; that track No. 2 is a switch track frequently used by employés of plaintiff in error and used by the defendant in error; that the scale box structure is about six feet high, five feet wide, and it and its location to the track is open, patent and obvious to the sight, all of which was well known to the defendant in error, or could have been known to him by the use of ordinary care, and by the use of ordinary care he could have avoided the collision with it, and that he was injured through his own negligence. Fifth: That the defendant in error well knew the situation and location of the track scale box in relation to track No. 2, and assumed the risk arising therefrom, and was injured by his own negligence in riding upon the car in the manner in which he rode, and in not using proper care to

avoid the collision, he knowing the danger and that he was approaching the same.

The trial resulted in a judgment in favor of the defendant in error. The plaintiff in error assigns errors, as follows:

1st. The trial court erred in refusing to permit defendant to introduce in evidence portions of the written application for employment as a brakeman on defendant's railroad, made by plaintiff to defendant on February 22nd, 1900, as shown by defendant's bill of exception; because said testimony was material to defendant, in this: that the questions asked plaintiff in said application, and the answer made thereto by plaintiff, show that said plaintiff had notice of the location of the track scale box, and that he was in danger of being knocked off a car in passing same.

2nd. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant, because the undisputed evidence established that said track scale box was erected in the defendant's yard and under the circumstances in a reasonably safe place and at a reasonable safe distance and location from track No. 2, on which track plaintiff was riding at the time he was injured.

3rd. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant because plaintiff testified he knew of the location of the track scale box, and the location of track No. 2 with reference to said track scale box, on which track No. 2 he was riding at the time he was hurt, and because the undisputed evidence shows that the track scale box and the danger of same was open and obvious to the view of plaintiff, and that neither the track scale box or the dangers thereof were hidden or latent, and plaintiff was presumed to know the danger and assume the risks thereof.

55 4th. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant for the reason that the entire and uncontroverted testimony established the fact that plaintiff knew of the location of the track scale box, and location of said track No. 2, with reference to said track scale box, on which track he was riding at the time he was hurt, and that the track scale box, and the dangers of the same were open and obvious to the view of plaintiff, and not hidden or latent, and plaintiff was presumed to know the dangers and assumed the risks.

5th. Because the trial court erred in the following portion of its charge to the jury:

'The defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact, and that by continuing in the work, with such knowledge, he assumed all risks incident to and arising out of his employment. Upon this point you are instructed that if you believe from the testimony that prior to the plaintiff's injuries he knew of the existence and location of the scale box, and of the danger incident to the discharge of his duties while passing the same on a moving train, if danger there was; or if, knowing of the location of the structure, the danger to

the employés while in the usual discharge of their duties was apparent that is, open to observation, then you are instructed that the plaintiff by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box, would not, as a matter of law, charge him with knowledge of the danger, if such there was, due to its proximity to the north rail of track No. 2, and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence.'

Because the proof showed that plaintiff knew of the location of the track scale box, and of track No. 2, on which he was riding at the time he was hurt, in reference to said scale box, and that the same and the location thereof was open and obvious to plaintiff's view, and being an experienced brakeman, he was charged with notice that riding on the cars as he did was dangerous, and he assumed the risks thereof, and the court should have so charged the jury.

McCormick, circuit judge, delivered the opinion of the court.

The first error assigned is not well taken. The bill of exceptions to which it refers, says, that at a certain stage of the trial, the defendant produced and showed to the plaintiff his written application for employment as a brakeman, signed by him and dated February 22nd, 1900. The plaintiff testified that he had read the same at the time he made it, and had written the answers thereto himself to the questions therein asked him, and had signed it. The defendant then offered in evidence the following portions thereof, for the purpose of showing that plaintiff had notice of the location of the track scale box, and that he was in danger of being knocked off of a car when passing the same:

Q. Do you make this application for employment in train service, realizing the hazardous nature of such employment, understanding that it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, track scale boxes, water tanks, coal houses, platforms, sheds, roofs, and other overhead and side structures, and that in the performance of the duties for which you are employed, you are liable to receive injuries by being knocked off the side or top of cars, unless you use due care to avoid injury thereby?

56 A. Yes.

Q. Do you agree to acquaint yourself with the location of all overhead and truss bridges, as well as the location of all other structures along the line of the road?

A. Yes.

Q. Do you understand that no officer or employé of this company is authorized to request or require you to use defective tracks, cars,

machinery, or appliances of any kind, and that when you do so you assume all the risk of injury therefrom?

A. Yes.

Q. Do you understand that this company desires to employ only experienced men in the service, and does not undertake to educate inexperienced men?

A. Yes.

Counsel for plaintiff objected to this testimony for the reason that it was irrelevant and immaterial, and that plaintiff had made this application and entered the employ of the defendant, and afterwards resigned and again entered the employ of the defendant some two years later without making another application; and also because it was offered on the part of the defendant to limit its liability for its own negligence and void as against public policy, and because the particular location of this track scale is not given. In our opinion it was not error to sustain the objection made to the proof. Gulf, Colorado & Santa Fe Railway Co. *v.* Darby, 67 S. W. Rep., 446.

Errors second, third and fourth will be considered together. In reference to these:

We remark in the first place, that the second states that the undisputed evidence established that the track scale box was erected at a reasonably safe distance and location from track No. 2. And the third states that the undisputed evidence shows that the track scale box and the danger of same was open and obvious to the view of plaintiff, and that neither the track scale box nor the dangers thereof were hidden or latent. And the fourth states that the entire and uncontroverted testimony established the fact that the scale box and the dangers of the same were open and obvious to the view of plaintiff, and not hidden or latent. The bill of exceptions purports to contain a statement of all the facts in evidence. It opens with about a page of what are put down as "facts about which there is no dispute." But this page of the statement of "facts about which there is no dispute" does not support the suggestions of the plaintiff in error as to what is established by the undisputed evidence and the uncontroverted testimony, as above no-
57 ticed. And more than that, all of the testimony given by the plaintiff in his own behalf and on his behalf by witnesses called by him, and much of the testimony drawn from witnesses called by the defendant, tends to question the existence of the facts which these assignments of error assume to have been established by undisputed evidence and uncontroverted testimony. Assuming, however, that it was the intention of the plaintiff in error to suggest and urge that the preponderance of testimony supported their view, said in the assignment to have been established by undisputed evidence and uncontroverted testimony, and that it resulted therefrom that the plaintiff was presumed to know the danger and to have assumed the risks thereof, this would present a case, not to have been

withdrawn from the jury, but to have been submitted to it under the proper instruction that if they, from a consideration of all the proof, found the fact to be as the defendant contended, either that the scale was placed at a reasonably safe distance and location from track No. 2, or if it was not, that the danger of the same was open and obvious to the view of the plaintiff, and that neither the track scale box nor the dangers thereof were hidden or latent, and were such, if they existed at all, that a reasonably prudent person engaged as plaintiff was, and in the conditions with which he had been and was then surrounded, would be presumed to know the danger, in such case the plaintiff must be held to have assumed the risk, and could not recover. To this effect substantially the jury were directly and clearly instructed.

To support its second assignment of error, defendant's counsel submit that where a railroad constructs its side tracks, and track scale boxes, and structures in its own private yards, where the safety of passengers and the public is not involved, and according to the requirements of the situation, and in the manner most convenient to facilitate the transaction of its business, and the same are open and obvious to the sight, and are not hidden or latent, an experienced man who goes to work there is presumed to know the danger thereof and assumes that risk. To sustain this proposition they cite Tuttle *vs.* Railway, 122 U. S. 189; Nicholas Content *vs.* New York, New Haven & Hartford Railroad Company, 165 Mass. 267; Terre Haute & Indianapolis Railroad Company *vs.* Becker, administratrix, 146 Ind. 202–19; Louisville, New Albany & Chicago Railway
58 Company *v.* Bates, administrator (*idem*) 564–74; Oglesby *v.* Missouri Pacific Railway Co., 150 Mo. 137–233.

We notice these cases in the reverse order of that in which they are cited. The Oglesby case is a decision rendered by the Missouri supreme court in bank, consisting of the seven judges. On the last page of the report, we find this: *Per curiam:* The foregoing opinion expressing the views of the different members of the court are ordered filed. Gantt, C. J., and Brace, J. concur with Valiant, J., for the affirmance of the judgment. Burgess and Marshall, JJ., hold the judgment should be reversed and the cause remanded for a new trial. Sherwood and Robinson, JJ., hold the judgment should be reversed without remanding but in order to dispose of the case concur with Burgess and Marshall, JJ., in ordering the judgment reversed and the cause remanded. Gantt, C. J., Brace and Valiant, JJ., dissenting. It will be observed that a bare majority of the court were in favor of reversing the judgment of the trial court, and this bare majority was equally divided on the question as to whether the case should be remanded for a new trial, or should be reversed without remanding. In this connection, we note that the report shows that section 3776 of the Revised Statutes of Missouri (1879) provides that the supreme court on appeals or writs of error shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court or give such judgment as

such court ought to have given, as to them shall seem agreeable. The case was one to recover damages for personal injuries alleged to have been received through the negligence of the defendant in putting into the train on which the plaintiff was hurt a defective car. After the proof both — the plaintiff and the defendant was all in, the defendant moved for a verdict, which was denied. The case was submitted to the jury and the plaintiff recovered. The leading opinion in the case, submitted by Judge Valiant, and concurred in fully by the Chief Justice and Judge Brace is, after the statement of the case, divided into five paragraphs or sections. The first relates to the state of the pleadings of the plaintiff, and concludes with the statement that there was nothing in the pleadings or evidence that would have justified the court in taking the case from the jury on the fellow servant doctrine. The second is addressed to the contention that there was no evidence tending to show that the defendant was liable on the theory that the wreck was caused by the
59 alleged defective car, and it concludes that there was substantial testimony to sustain every fact necessary to be proved by the plaintiff under the instructions given; that there was nothing to indicate any fault on his part; therefore there was no foundation for the demurrer to the evidence. The third considers the contention that *that* the jury awarded excessive damages, and it concludes with the statement that there is nothing in the record to indicate that the sum awarded was anything else than the result of the jury's honest judgment, and that there is no reason why the court should disturb their verdict. The fourth relates to the refusal of certain instructions requested by the defendant, touching which, it is said: "These were in the nature of demurrers to the evidence, and are disposed of by the discussion on that subject." In this paragraph the opinion adds: "But some of the instructions given for the defendant should not be passed without notice. Although this is its appeal, and therefore, there is no exception to the ruling of the court in giving defendant's instructions; yet as those instructions will be published in this record, and as they contain erroneous views of the law, they are liable to be considered as having passed with the approval of this court, and might be followed as precedents." The first third and fourth of the requested charges given by the court for the defendant were then quoted and criticised. The fifth paragraph contains only one line, in these words: "The fifth instruction contains the same error." The opinion concludes: "There is no error in this record of which the defendant has a right to complain. The judgment of the circuit court ought to be affirmed." Gantt, C. J., and Brace, J., concur; Burgess, J., concurs in paragraphs 1, 2, and 3. The opinion of Marshall, J., was very brief. He says: "I am of opinion that there is no evidence that the car was not properly inspected, and want of proper inspection was the only act of negligence upon which the plaintiff could predicate a recovery under the facts as disclosed by this record. * * * In the absence of such showing, I think that the negli-

gence as to inspection was not sufficiently shown, and therefore, the judgment should be reversed and the cause remanded." The separate opinion of Sherwood, J., in which Robinson, J., concurred,
60 covers 65 pages of the report, and has the tone throughout of a dissenting opinion. In it he quotes at length from the opinion of Chief Justice Monks, in the case of Railroad *v.* Bates (*supra*), in which quotation this occurs: "They (the jury) cannot be allowed to set up a standard which shall in effect dictate the custom or control the business of a community;" citing in support thereof two Pennsylvania cases, and Tuttle *v.* Railroad, (*supra*).

It is difficult to extract from the report of this decision the persuasive authority applicable to the case we are reviewing on this writ of error. The case of Railway Company *v.* Bates, (*supra*) is thus stated by Chief Justice Monks: in the opinion of the court: "Appellee's intestate while in appellant's service was killed when in the act of coupling cars upon appellant's road, and this action was brought to recover damages therefor, upon the ground that his death was caused by appellant's negligence. Appellant's demurrer for want of facts to sustain the amended complaint, was overruled. After issue was joined the cause was tried by the jury and a special verdict returned. Appellant moved the court to render judgment in its favor on said verdict, which motion the court overruled, and rendered judgment in favor of the appellee. These rulings of the court are severally assigned as error." After an elaborate discussion of the different contentions the opinion concludes: "It follows that the court erred in rendering judgment in favor of appellee. It is claimed by appellant that the case made by the verdict does not correspond with the allegations or theory of the complaint. As the case must be reversed for other reasons, and the complaint may be amended before another trial, it is not necessary for us to determine this question. We think justice requires that instead of directing a judgment upon the verdict, that a new trial be awarded. Judgment reversed with instructions to award a new trial, with leave to amend the complaint, and for further proceedings not inconsistent with this opinion." In the case of Railroad Company *v.* Becker, (*supra*), there was a special verdict. The whole case being considered on the appeal the supreme court found that "under the circumstances in this case the peril which the deceased was subjected to by reason of such irregular trains was a risk incident to the service which he had entered, and one which he assumed under his contract of employment." It is announced
61 further: "We do not consider that the fi-th finding of the jury relative to the curves in appellant's road between Waveland and Dooley, and its surroundings, under the circumstances can serve to exert any influence over the question of appellant's negligence." After quoting from Tuttle *v.* Railroad Company (*supra*) the opinion proceeds: "The thirteenth and fourteenth findings may properly be considered as being of the character of legal conclusions, and hence can serve no purpose in a special verdict,

and must, therefore, be disregarded. Elliot Gen. Practice, vol. 2, sec. 931 and authorities there cited. The 15th findings is not within the issue of the third paragrapg of the complaint. No reasons are urged in support of the cross errors assigned by appellee, hence they must be deemed as waived. The court erred in awarding judgment on the special verdict in favor of appellee, for which error the judgment is reversed and the cause is remanded, with instructions to the lower court to render its judgment upon the special verdict in favor of appellant." In Content *v.* Railroad, (*supra*) the opinion states: "There was no conflict in the evidence as to the material points. The position of the tracks was open and visible. The use and the size of the Star Union cars were known to the plaintiff. The side tracks were used as storage tracks and were generally filled with cars. At the place where the plaintiff was hurt, the side track was parallel with the track upon which he was riding and had not begun to curve in towards the other track. * * * The defendant did not owe it as a duty to the plaintiff to change the position of its tracks or to discontinue the use of Star Union cars upon its railroad, or to make a change in its custom of storing these and other cars upon the side track. Therefore, in the legal sense the defendant was guilty of no breach of duty and of no negligence towards him. If the plaintiff entered into the employment of the defendant, he must he held to have assumed the risk arising from these things."

In Tuttle *v.* Railroad (*supra*) the pleadings on which plaintiff relied alleged that the siding called the "boot-jack siding" was negligently and unskillfully constructed by the defendant, with so sharp a curve that the drawheads of the cars in use by defendant would pass each other and cause the cars to crush any one who attempted to make a coupling thereon. This alleged faulty construc-
62 tion of the track was the principal matter of contest on the trial. Plaintiff contending that the defendant was bound in duty to its workmen and employés to construct a track that would not expose them to the danger which existed in this case. Whilst the defendant contended, and offered evidence to prove, that the track was constructed according to the requirements of the situation, a sharp curve being necessary at this place in order to place the cars when loading alongside of the dock or slip. That such curves were not uncommon in station yards; that in such condition the drawheads of cars quite often pass each other when the cars come together; that this must be presumed to have been well known to Tuttle, the deceased, who was an experienced yardman; that he accepted the employment with the full knowledge of its risks, and must be held to have assumed them; that it was negligence on his part to place himself in such a situation as to incur the danger and suffer the injury complained of. It appeared by the evidence that when trying to make the coupling the deceased stood on the inside of the curve, where the corners of the cars come in contact when the drawheads pass each other, and will crush a person caught between

them; whereas on the outside of the curve they are widely separated, and there is no danger. The defendant contended that the position thus taken by Tuttle was contributory negligence on his part. On the other hand, the plaintiff offered evidence tending to show that it was usual for the brakeman, in coupling cars on a curve, to stand on the inside so as to see the engineer and exchange signals with him for stopping, backing or going forward. The defendants contended, and offered evidence tending to show, that this was not necessary, as there was always a yardmaster or others standing by to co-operate, by whom the signals could be given. Upon the evidence adduced the trial judge directed the jury to find a verdict for the defendants, holding that Tuttle wantonly assumed the risk of remaining on the inside of the draw-bar, when he should have gone on the other side, and that the defendants ought not to be held in this action. It was on this state of case that the language was used in the opinion of the court, on which the plaintiff in error, in the case before us, so strongly relies and which its counsel largely quotes. A part of this language we quote: "We have carefully read the evidence presented by the bill of exceptions, and although it
63 appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires courts to lay down any rule of law to restrict a railroad company as to the curve it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varied and uncertain opinions of juries to determine such an engineering question." Then after some further discussion of principles and precedents and the particular facts of the case in hand, the opinion proceeds: "Without attempting, therefore, to give a summary of the evidence, we have no hesitation in saying that the judge was right in holding that the deceased, by voluntarily assuming the risk of remaining on the inside of the draw-bar, brought the injury upon himself, and the judge was right, therefore, in directing a verdict for the defendant."

The Union Pacific Railway Company *v.* O'Brien, 49 Fed. Rep. 538; 1 C. C. A. 354; 4 U. S. App. 221, was an action of Nora O'Brien against the railway company to recover damages for the death of her husband, alleged to have been caused by the defendant's negligence. The case was sent to the jury upon the issue of negligence on the part of the company in not properly constructing the track, in that no outlet was provided for the water which would be liable to come down upon the track and deposit thereon sand and other obstructions, and of contributory negligence on the part of the deceased, and upon both issues the jury found in favor of the plaintiff and assessed her damages. Judgment was rendered on the verdict, and the company brought the case to the circuit court of appeals of the 8th circuit. On the hearing in that court, Judge Oliver P. Shiras sat as one of the members thereof and delivered the opinion of the court. In referring to the case of Tuttle *vs.* Railway (*supra*),

which was cited by the plaintiff in error in argument, he said in substance: The principle of this decision cannot be carried to the extent claimed in argument by counsel for plaintiff in error. If it was applicable in the broad sense claimed for it, the result would be that the well established rule that it is the duty of the company to use due care and skill in the construction and maintenance of the roadbed and track and in furnishing proper machinery for the use of its employees would be wholly abrogated. In one sense it is a question of engineering
64 skill to determine how a road bed and track shall be constructed, and, if the conclusion of the engineer in charge thereof is final and cannot be challenged before a court and jury by one who has suffered injury by reason of defects in the road bed and track, then it is useless to say that the railway company is bound to exercise due care in the construction of its road bed, for it could always be prepared to prove that the road was built in accordance with the instruction of its engineer. The difference between the kind of knowledge called into action in determining the sharpness of a curve that is needed in running a railway line at a given point, and that exercised in determining whether the exigencies of a given situation require that some escape or outlet be furnished for water liable to come down a natural water-way intersecting the line of railway, is so great that it renders the rule applicable to the one case inapplicable to the other. The training and knowledge of an engineer is not needed to enable one to understand the action of water in rushing down a gulley or similar water-way, nor to know if any obstruction like a solid railway road bed is built across a water-way, down which any considerable amount of water may be expected to pass, that, unless an outlet is given to it, it must of necessity collect against the road bed, and perchance overflow it. Such facts are matters of common knowledge gathered from the experience and observation of every day life, and hence a jury is entirely competent to pass upon an issue involving considerations of that nature. This case was taken to the Supreme Court, and in the opinion of that court, delivered by the Chief Justice, this language occurs: "In our opinion, the circuit court of appeals committed no error in its rulings and in affirming the judgment of the court below, and we are not inclined to re-state the reasons for the conclusions reached by that court, which are fully set forth in the case as reported." 161 U. S. 457.

In the case of Wood *vs.* Louisville & Nashville Railroad Company, 88 Fed. Rep. on page 46, we find views expressed by Judge Hammond, which we think are sound and applicable to the case before us. He says: "It cannot be required of a brakeman that he shall go about upon the line of a railroad upon which he is operating and lay a foot rule to all the structures of this kind, and see whether, or not they be so close as
65 to make it necessary that he should be watchful when he is climbing the ladders, or to avoid taking the ladder

until the chute shall have been passed. The fact that no accident of this kind had happened before upon the railroad, and that trains were constantly passing this chute without the development of this danger, brings it directly within the class of what we may call 'concealed dangers.' This danger was lurking for years without its being known. The constituent element of it was a matter of mere inches, and that, in the very nature of things could not be detected by ordinary observation. It is an idle struggle to escape the liability for this negligence to impute contributory negligence of the plaintiff under the circumstances of this case. Even, if he had been aware of the fact that the cattle chute was there, it does not follow that he was aware of the fact that it was a few inches more or less too close to the track, and he had a right to rely upon and believe that the railroad company would not put it too close to the track, or would not permit the constructor whom they allowed to build it to put it too close to the track, to injure their employés. It is a danger that does not probably show itself until an accident like this brings it into prominence, either to the railroad owner who operates the road or to the man who originally constructed it. They were thinking of establishing a clearance for the cars and not for a man climbing the ladders at the moment of passing the chute. That danger was probably not thought of by anybody; not by the constructors any more than by the plaintiff. It is a danger that might arise, and possibly did arise in this case, because the car on which he was mounted was wider than ordinary cars, or perhaps the ladder might have been constructed so as to have been further away from the side of the car than in the ordinary construction of ladders. Many differences of this kind might appear to make a danger in this particular conjunction of a brakeman on a ladder and a cattle chute too near the track that would not be observable to any ordinary intelligence or observation. The case was fairly left to the jury, and they have decided these questions of negligence and contributory negligence against the defendant, and I think, properly so."

From Peirce *v.* Clavin, 82 Fed. Rep., p. 552, we quote language used by Judge Jenkins in delivering the opinion of the circuit court of appeals for the 7th circuit as follows: "Is the defendant in error also chargeable with notice of this obvious defect? If he is, he could not recover. The switch, if defective and dangerous, was in such condition when the defendant in error entered into the service of the receiver. He assumed, in entering upon that service, not only such risks and perils as are incident to the performance of his duty, but the risk of such extra hazard and peril of which he has either actual or presumed knowledge; and where the defect is obvious, knowledge is presumed of the dangers which it suggests and which are apparent. (Citing authorities.) The question should, therefore, have been submitted to the jury, whether the defendant in error knew, or ought reasonably to have known the danger to him from this alleged defective appliance."

66

As was said in the opinion of the Supreme Court, in the case of the Union Pacific Railroad *v.* Everett: "It is not easy on a subject of this kind to lay down unbending rules, and conflicting cases can readily be found; but without pursuing the subject further we are satisfied that in the present case there is no conclusive evidence of the want of due care on the part of Everett in not observing the projecting timber while he was in the discharge of his duty and while his attention was directed to the work in which he was engaged."

In Lindsay *vs.* New York, New Haven & Hartford Railroad Company, 112 Fed. Rep., p. 384, it was well said by Judge Lacombe: "Citations of opinions in other cases are not especially helpful, since the decision of each case necessarily depends on its own facts, and these are rarely the same in any two cases." On the facts of that case which he was considering, he assumed that the place where the plaintiff was set to work was not reasonably safe, and that he acted on the night in question with reasonable prudence under the circumstances, and said: "If the plaintiff's sole opportunity of observation had been in the obscurity of night, he might have worked there a long time without observing them (sluice-ways and drains that ran under and across the tracks); but when it appears that during the months of April, May and June, and the first week in July, he was moving back and forth over these open and projecting drains every day from daybreak until 7 a. m., he must be held chargeable with
knowledge of their existence, and of whatever risk to one
67 using the pathway their appearance would indicate even to
the casual observer." Earlier in the opinion it had been said: "Where there is reasonable ground for difference of opinion as to whether the defect was plainly observable by him, the jury should decide; but when it is plainly thus observable, the court will dispose of the case by direction of a verdict." It would seem that the trial court had directed the verdict, and the judgment of that court was affirmed.

In the opinion of the court in Union Pacific Railway Company *vs.* Lehmberg, 75 Texas Rep., on page 67 we find this language used by Judge Henry, which commends itself to our concurrence: "Without now considering the question whether the rule in this respect charges an employé with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not under any circumstances exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond that he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances. The evidence discloses that the deceased could see that the engine had a square tank, but it fails to show that he was aware of the different degrees of danger between the use of that and one with a slop-

ing tank, or that he understood the nature of the danger to himself from the use of a square tank."

It has come to be familiar law that a servant is held to assume the ordinary risks of the business upon which he enters, so far as those risks at the time of his entering upon the business, are known to him, or should be readily discernible by persons of his age and capacity in the exercise of ordinary care. And whether the business is dangerous or not, notwithstanding the general rule that the master is bound to use due care to furnish safe and sound material, machinery, appliances, etc., yet the servant assumes the risk of obvious defects in the things which he voluntarily uses. If his work consists in whole or in part in dealing with dangerous, unsafe or unsound things, known to him to be so, or obviously so, and which by the very nature of the business must be used while in that condition, he assumes the risk of doing so.

68 In the preface to the 5th edidition of Shearman & Redfield on Negligence, it is said to be "particularly noteworthy that even after allowing for some recent reactionary decisions the general tendency of the Federal courts has been toward a liberal interpretation of the law of negligence in favor of the public and especially of servants." It appears to be settled in Texas that railroad corporations or other persons owning or controlling railroads and operating trains thereon are responsible in damages to one of their servants for injury sustained without fault or negligence on his part from the negligent construction or erection by them of an appendage of the road which subjects such servant to unnecessary hazard and danger, which he could not reasonably have anticipated, and of which there is proof he was not informed. Also that a railroad employee owes no duty of inspection to discover obstructions dangerously near the track which are due to the company's negligence, and does not necessarily assume them by his contract of service, though they are permanent in character and exist at the time he enters the service. H. & T. C. Ry Co. *v.* Henry Oram, 49 Tex. p. 341; Missouri Pacific Ry. Co. *vs.* Pauline Lehmberg, 75 Tex. p. 61, (*supra*); Bonner & Eddy, receivers *v.* J. C. La None, 80 Tex., p. 117; Gulf, Colorado & Santa Fe Ry. Co. *v.* Darby, 67 S. W. Rep., p. 446, (*supra*); Galveston, Houston & San Antonio Ry. Co. *v.* Morston, (Texas Civil Appeals, 4th District, January 7, 1903), Texas Court Reporter, vol. 6, No. 10, Feb. 16, 1903, p. 537.

The passage by the Congress of the United States of the act to promote the safety of employés and travelers upon railroads, etc., approved March 2, 1893, and amended April 1, 1896, and again amended and extended March 2, 1903, and the action of those States including Texas where this action arose, in abolishing by statute so much of the fellow servant doctrine as applied to railroad employés, and declaring void any contract between such employés and their employers as seeks to impose upon such employé the assumption of the risk from the negligence of their fellow servants and the judicial recognition, in Texas at least, that it is against public policy that

railroad employés should be permitted by contract express or implied to assume the risks of dangers not inherent in the business but arising from the negligence of the employer, clearly indicate the propriety and necessity of modifying the terms and limit-
69 ing the application of the rules theretofore announced by courts of the highest authority with reference to the doctrine of assumed risks.

From a somewhat extended and careful re-examination of recognized precedents and of the more recent editions of the works of standard text-writers bearing upon the questions involved in the alleged errors which we are considering, we are satisfied that these assignments are not well taken. And what we have said on these does, in our opinion, also dispose of the fifth assignment of error.

The judgment of the circuit court is therefore affirmed.

70 United States Circuit Court of Appeals, Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM WHEELER SWEARINGEN, Defendant in Error. } No. 1219.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above entitled cause, there is manifest error in this, to-wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Texas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Texas, and in holding that said court committed no error in refusing to permit defendant to introduce in evidence portions of the written application for employment as a brakeman on defendant's railroad, made by plaintiff to defendant on February 22, 1902, as shown by defendant's bill of exception; because said testimony was material to defendant, in this: that the questions asked plaintiff in said application, and the answers made thereto by plaintiff, show that plaintiff had notice of the location of the track scale box, and that he was in danger of being knocked off a car in passing same.

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Texas, and

in holding that said court committed no error in overruling defendant's motion to instruct the jury to return a verdict for defendant, because the undisputed evidence established that said track scale box was erected in the defendant's yard, and under the circumstances in a reasonably safe place, and at a reasonably safe distance and location from track No. 2, on which track plaintiff was riding at the time he was injured.

71

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Texas, and in holding that said court committed no error in overruling defendant's motion to instruct the jury to return a verdict for defendant, because plaintiff testified he knew of the location of the track scale box, and the location of track No. 2, with reference to said track scale box, on which track No. 2 he was riding at the time he was hurt, and because the undisputed evidence shows that the track scale box and the danger of same was open and obvious to the view of plaintiff, and that neither the track scale box or the dangers thereof were hidden or latent, and plaintiff was presumed to know the danger and assume the risks thereof.

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Texas, and in holding that said court committed no error in overruling defendant's motion to instruct the jury to return a verdict for defendant, for the reason that the entire and uncontroverted testimony established the fact that plaintiff knew of the location of the track scale box, and location of said track No. 2, with reference to said track scale box, on which track he was riding at the time he was hurt, and that the track scale box, and the dangers of same, was open and obvious to the view of plaintiff, and not hidden or latent, and plaintiff was presumed to know the *damager*, and assumed the risk.

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Texas, and in holding that said court committed no error in the following portion of its charge to the jury:

"The defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact, and that by continuing in the work, with such knowledge, he assumed all risks incident to and arising out of his employment. Upon this point you are instructed that if you believe from the testimony that prior to the plaintiff's injuries he

72

knew of the existence and location of the scale box, and of the danger incident to the discharge of his duty while passing the same on a moving train, if danger there was; or if, knowing of the location of the structure, the danger to the employés while in the usual discharge of their duties was apparent, that is, open to observation, then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box, would not, as a matter of law, charge him with knowledge of the danger, if such there was, due to its proximity to the north rail of track No. 2, and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence."

Because the proof showed that plaintiff knew of the location of the track scale box, and of track No. 2, on which he was riding at the time he was hurt, in reference to said scale box, and that the same and the location thereof was open and obvious to plaintiff's views, and being an experienced brakeman he was charged with notice that riding on the cars as he did, was dangerous, and he assumed the risk thereof, and the court should have so charged the jury.

Wherefore, The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment be reversed, and it will ever pray.

T. J. FREEMAN,
Attorney for The Texas and Pacific Railway Company,
Plaintiff in Error.

The foregoing has the following endorsements, to-wit:
No. 1219. The Texas & Pacific Railway Co., plaintiff in error, *vs.* William W. Swearingen, defendant in error. Assignments of error. Filed 16 day of May, 1903, Charles H. Lednum, clerk of the United States circuit court of appeals.

73 Know all men by these presents, that we, The Texas and Pacific Railway Company, as principal, and George J. Gould of Lakewood, New Jersey, as surety, are held and firmly bound unto William W. Swearingen in the full and just sum of fifteen thousand (15,000) dollars, to be paid to the said William W. Swearingen, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of May in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at a regular term of the United States circuit court of appeals for the fifth circuit, in a suit depending in said court, be-

tween The Texas and Pacific Railway Company, plaintiff in error, and William W. Swearingen, defendant in error, a judgment was rendered against the said railway company, affirming a judgment of the circuit court of the United States for the western district of Texas for the sum of seven thousand five hundred dollars ($7,500) and the said The Texas and Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said W. William Swearingen citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Texas and Pacific Railway Company shall prosecute its said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remian in full force and virtue.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By GEO. J. GOULD, *President.* [SEAL.]
GEO. J. GOULD. [SEAL.]

Sealed and delivered in presence of—
D. D. DUNCAN.

Attest:
[CORPORATE SEAL.] C. E. SATTERLEE, *Sec'l'y.*

Approved, to operate as a supersedeas, by
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Copy. No. 1219 In the United States circuit court of appeals for the fifth circuit. The Texas & Pacific Railway Company *v.* William W. Swearingen Bond on writ of error. Filed 16 day of May 1903 Charles H. Lednum, clerk of the United States circuit court of appeals.

74 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 74 pages, numbered from *a* to 73, inclusive, contain a true copy of the record, assignment of errors and all proceedings in the case, including the opinion of the court, in the case of The Texas & Pacific Railway Company, plaintiff in error, *versus* W. W. Swearingen, defendant in in error, No. 1219, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In witness whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, Louisiana, this 25th day of May A. D. 1903.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

75 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and William W. Swearingen, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of May, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

76 [Endorsed:] No. 1219. In the United States circuit court of appeals for the fifth circuit. The Texas & Pacific Railway Company *v.* William W. Swearingen. Writ of error. Filed 16 day of May, 1903. Charles H. Lednum, clerk of the United States circuit court of appeals.

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error, 16th day of May, 1903.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

77 UNITED STATES OF AMERICA, *ss:*

To William W. Swearingen or his attorney of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 14th day of May, in the year of our Lord one thousand nine hundred and three.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

MAY 21ST, 1903.

I hereby acknowledge service of this citation on myself and accept service of the same.

RUFUS VINTUS BOWDEN,
Attorney of Record for William W. Swearingen.

78 [Endorsed:] Citation. Filed May 25, 1903. Charles H. Lednum, clerk.

Endorsed on cover: File No. 18,950. U. S. C. C. of appeals, 5th circuit. Term No. 48. The Texas and Pacific Railway Company, plaintiff in error, *vs.* W. W. Swearingen. Filed May 29", 1903.

IN THE

Supreme Court of the United States.

TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
W. W. SWEARINGEN,
Defendant in Error.
No.

BRIEF FOR PLAINTIFF IN ERROR.

W. W. Swearingen, defendant in error, instituted this suit on the 24th day of February, 1902, as plaintiff in the District Court of El Paso County, Texas, 34th Judicial District (see Record pp. 2) and thereafter this cause was removed in due time and according to law by plaintiff in error here, defendant there, to the United States Circuit Court, Western District of Texas, sitting at El Paso, Texas (Record pp. 5.6.7.8.9.) and the same was duly filed in the said Court on the 25th day of August, 1902 (Record p. 9) and on the 11th day of November, 1902, de-

fendant filed his amended original petition, in which he alleges substantially as follows: That the defendant owned and operated, on and prior to the 7th day of February, 1902, a line of railway, running into and through El Paso County, and across the State of Texas, and into the City of El Paso, where it has tracks and switches constituting a general switch yard for the handling, switching and shifting, of both passenger and freight cars; that on and prior to the 7th day of February, 1902, he was in the employ of plaintiff in error as a switchman, working in its switch yard in the City of El Paso, and his duties were to couple and uncouple cars, shift switches, and assist in the placing, switching and shifting of cars on the various tracks in the switch yard, which cars were moved by means of a locomotive; that he was under the direction and supervision of another servant of plaintiff in error called a yardmaster.

That on the 7th day of February, 1902, while engaged in the performance or his duties he was riding on the ladder on the side of a certain freight car of a train of cars attached to said locomotive, which ladder is placed there for employes to ride on while working, and which train of cars were going in a westerly direction along track No. 2 of the switch yards; that his body was swinging slightly out from the car in the proper and usual position to ride on said ladder.

That the yardmaster was at the east end of the train of cars, directing their movements by means of a lantern, it being in the night time, and he was looking back towards said yardmaster for such signals as he might want to give, as was his duty, when he came in contact with the scale box structure, which had been

negligently placed by plaintiff in error, or permitted to remain so near the north rail of said track as not to permit of the passage of his body in the position he was riding, and he was thrown to the ground and dragged along by the cars and permanently injured.

That the scale structure was of a permanent character, and had been at the same place for many months prior to the time he received his injury, and had been placed there, and during said time maintained and used by plaintiff in error, or was permitted to remain there by plaintiff in error; plaintiff in error knowing, or could have known by the use of ordinary care the location of it, and it was during all said time so close to the north rail of said track as to endanger the life and limb of plaintiff in error and other employes while engaged in their duties, and constituted a dangerous obstruction to said track, all of which was well known to plaintiff in error, or could have been known by the use of ordinary care, but which was unknown to plaintiff; that in placing said scale structure or permitting it to remain at the place above recited, plaintiff in error was guilty of negligence, and defendant in error received his injuries by reason of said negligence; that defendant in error claims damages in the sum of $25,000.00. (Record, pp 9.10.11.12.)

Plaintiff in error, defendant below, answered in its first amended original answer filed November 12th, 1902, first, general demurrer; second, general denial; third, special plea, that defendant in error injuries were not caused by negligence of plaintiff in error, and denying that said scale structure was erected so near said track on which defendant in error was working as to injure him, but that the same was erected in a proper and

safe manner and at a safe and proper distance from said track, and that defendant in error was injured through his own negligence in the careless manner in which he rode on said cars; fourth, that if said scale box structure was erected so near said track as to be dangerous to defendant in error, he knew it, or could have known of it by the use of ordinary care, and assumed the risk arising therefrom in this, that he had been in the employ of plaintiff in error both as a switchman and brakeman for a long time prior to the accident, and worked in the yards and especially on said track No. 2 on which he was injured; that track No. 2 is a switch track frequently used by employes of plaintiff in error and by defendant in error; that the scale box structure is about six feet high and five feet wide, and it and its location to the track is open, patent, and obvious to the sight, and all of which was well known to defendant in error, or could have been known to him by the use of ordinary care, and by the use of ordinary care he could have avoided the collision with it, and that he was injured through his own negligence; fifth, that defendant in error well knew the situation and location of the track scale box in relation to track No. 2, and assumed the risk arising therefrom, and was injured by his own negligence in riding upon the car in the manner which he rode, and in not using proper care to avoid the collision, he knowing the danger and that he was approaching the same. (Record, pp. ~~14-15~~.) 12.13.14

The cause was tried at the November Term A. D. 1902, of the United States Circuit Court, Western District of Texas, at El Paso, and resulted in a judgment on November 14, 1902, in favor of defendant in error against plaintiff in error for $7,500. (Record p. 15).

Plaintiff in error duly filed on December 17, 1902, its bill of exceptions, (Record pp. 19), assignments of error (Record pp. 37), petition (Record, p. 39), bond for writ of error (Record pp. 41), and carried the cause by writ of error to the Honorable United States Circuit Court of Appeal, for the Fifth Circuit at New Orleans, La., which Court affirmed the verdict of court below, see 122 Fed. Rep. p. 193, from which decision plaintiff in error has perfected its writ of error to this Honorable Court.

At the time defendant in error was injured he was a member of a switching crew working in the yards of plaintiff in error, composed of L. C. Brown, engineer, W. T. Butts, fireman, operating switch engine, and R. P. Moore, yardmaster, and Frank I. Williams, and defendant in error, switchmen.

Tracks Nos. one and two hereinafter referred to in the testimony are switch tracks and run parallel to each other, in an easterly and westerly direction, and track No. one is called the weigh track and runs across the bed part of the scales, and is north of the scale box structure, and track No. two is just south of the scale box structure, and is the track on which defendant in error was riding on a car at the time he collided with the scale box structure.

The scales consist of two parts. One the bed or weighing part, on which track No. one is, and the other part is that which hold the balances to the scales, and is an upright structure more than six feet high and about five feet long, by the side of the track, and about 18 inches thick, and is painted a light green color, and is called the scale box.

The switch engine always heads west, and the engineer's side is the north or right hand side, and the

switchmen always work on the north or right hand side for convenience in signaling the engineer how to move the engine and cars. (Trans. ~~22, 23~~. 19. 20

The errors assigned in this court are the same as those assigned in the Circuit Court of Appeals, with the exception of the general assignment of error that the Circuit Court of Appeals in affirming the judgment of the United States Circuit Court for the Western District of Texas. The first assignment of error which was relied upon in the Circuit Court of Appeals at New Orleans, and which we assign in this court, is as follows:

> "2nd. The trial court erred in refusing to permit defendant to introduce in evidence portions of the written application for employment as a brakeman on defendant's railroad, made by plaintiff to defendant on February 22nd, 1902, as shown by defendant's bill of exception; because said testimony was material to defendant, in this: that the questions asked plaintiff in said application, and the answers made thereto by plaintiff, show that plaintiff had notice of the location of the track scale box, and that he was in danger of being knocked off a car in passing same."

And in connection with this assignment of error, we present also the assignment of error that the Circuit Court of Appeals at New Orleans erred in holding that this assignment of error was not well taken. We respectfully submit to the Court that the question involved in this assignment of error is one of great importance to railway companies, at least in the section of country through which the Texas and Pacific Railway is operated, for the reason that with a full knowledge of the great dangers incident to train service, men who have had practical experience in such service have

attempted, in the form of application blanks such as was attempted to be introduced on this trial, to call the attention of employes in train service to the many risks and dangers incident to said service, and the effect of the opinion of the learned Judge of the Circuit Court of Appeals in holding that the form of application blank in use by the Texas and Pacific Railway Company in this instance is void as against public policy, and could not be used even as evidence of the fact that the employer had attempted to call the attention of the employe to the risk and dangers of the service, is to say to the men in charge of the operation of railways in the Southwest that they are forbidden to advise their employes of such dangers, and in effect holds that any employe, however well advised of such dangers, does not assume any such risk. It is an elementary proposition entering into all contracts between master and servant that the servant assumes all the risks ordinarily incident to the business. To use the language of the authorities:

> "When a servant enters into the employment of another, he assumes all the risks ordinarily incident to the business. He is presumed to have contracted in reference to all the hazards and risks ordinarily incident to the employment; consequently he cannot recover for any injuries resulting to him therefrom."

2. A servant takes the risk of the master's mode of conducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work. There are risks and dangers incident to most employments, those risks the parties have in view when engagements for services are made, and in consideration of which the rate of compensation is

fixed. In all engagements of this character, the servant assumes those risks that are incident to the service, and as between himself and the master, he is supposed to have contracted on those terms, and if injury is sustained by the servant in that service, it is regarded as an accident, and the misfortune must rest on him."

Authorities:

Wood's Master & Steward, 2nd Edition, Section 326.
Wood's Railway Law, 3rd Volume, Section 370, page 1452.
A. & E. Encyclopedia, Volume 14, bottom page 843, Section 23, under head of Master and Servant; also bottom page 845, under subhead Master's Business Methods.
Texas & Pacific Railway Co. v. Minnick, 57 Fed. Rep., pp. 362–8.
Tuttle v. Railway, 122 U. S. 189.
Randall vs. Railway, 109 U. S. 478.
H. & T. C. Ry. Co. v. Conrad, 62 Texas 627.
Woodward v. St. Paul M. & M. Ry. Co., 18 Fed. Rep. 282.
Missouri Pacific Ry. Co. v. Summers, 71 Tex. 700.
Green v. Cross & Eddy, Receivers, 79 Tex. 130.
Naylor v. Railway Co., 5th A. & E. R. R. Cases, 406.
Wonder v. Baltimore Ry. Co. 32 Maryland, 411.
Crilly v. Texas & Pacific Ry., Co., decided by Louisiana Supreme Court, January 4, 1892, reported in Vol. 53 A. & E. R. R. Cases, p. 104.
Kohn v. McNulty, Receiver, 147 U. S. 238.

In considering the rules laid down above, it should also be considered in connection with the following doctrine, which is the established law of the land, to-wit: that it is the duty of the master to advise the serv-

ant, or to inform him, of the dangers incident to the employment, if the servant is ignorant of them. If the dangers are obvious and patent, and the servant advises himself, of course the duty of being advised by the master would not be imposed. One of the specific issues in this case was whether or not the plaintiff below was advised of the location of the scale box, and the fact that it was a danger incident to his employment. The Court below, in its charge to the jury, recognized this issue, and submitted to the jury the question as to whether or not the plaintiff was advised of the location of the scale box and the danger incident thereto. We call the court's attention to so much of the bill of exceptions covering the attempted introduction of the application for employment blank. It reads as follows:

> "The defendant then produced and showed to the plaintiff his written application to defendant company for employment as a brakeman signed by plaintiff and dated February 22, 1900, and plaintiff testified that he had read the same at the time he made it, and had written the answers thereto himself to the questions therein asked him, and had signed it. Defendant then offered in evidence the following portions of said application, consisting of questions and the answers thereto written by plaintiff for the purpose of showing that plaintiff had notice of the location of said track scale box, and that he was in danger of being knocked off of a car when passing the same:
>
> Question: 'Do you make this application for employment in train service, realizing the hazardous nature of such employment, understanding that it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, track scale boxes, water tanks, coal houses, platforms, sheds, roofs and other overhead and side structures, and that in performance of the duties for which you

are employed you are liable to receive injuries by being knocked off the side or top of cars, unless you use due care to avoid injury thereby.'

Answer: 'Yes.'

Question: 'Do you agree to acquaint yourself with the location of all overhead and truss bridges, as well as the location of all other structures along the line of the road?'

Answer: 'Yes.'

Question. 'Do you understand that no officer or employe of this company is authorized to request or require you to use defective tracks, cars, machinery or appliances of any kind, and that when you do so you assume all risk of injury therefrom?'

Answer. 'Yes.'

Question. 'Do you understand that this company desires to employ only experienced men in the service, and does not undertake to educate inexperienced men?'

Answer. 'Yes.'

Counsel for plaintiff objected to the said testimony for the reason that it was irrelevant and immaterial, and that plaintiff had made this application and entered the employ of defendant, and afterwards resigned, and again entered the employ of the defendant some two years later, without making another application, and also because it was an effort on the part of defendant to limit its liability for its own negligence, and void as against public policy, and because the particular location of this track scale box is not given; and the Court having sustained plaintiff's objections and excluded said testimony, the defendant then and there excepted to the action of the Court in excluding said evidence, and tenders this, its bill of exception, which is allowed, signed and sealed by the Court."

Record 31. 32

This Court's attention is called to the fact that the purpose of introducing so much of said blank was that of showing that the plaintiff had notice of

the dangerous location of said track scale box, and that he was in danger of being knocked off a car when passing the same. Said application to defendant company for employment was not introduced in bar to any recovery if negligence were shown, but was introduced as proper evidence to go to a jury to enable them to say whether or not the plaintiff Swearingen had been advised of certain risks and dangers, and if so, whether he had acted on such advice. The real and substantial issue in this case was whether of not Plaintiff Swearingen had knowledge of the location of the scale box, and whether or not, having such knowledge, he knew there was danger, and such a danger as he had assumed when he entered the service. - Swearening, in his own testimony, expressly states as follows:

> "I knew the location of the scale before I was hurt. I knew it was between tracks Nos. 1 and 2, but I did not know anything with reference to its proximity to track No. 2, and did not know it was dangerously close to track No. 2. At the time I was hurt I had no knowledge of the distance between the scale box and No. 2 track. I was never warned about the danger of getting knocked off of cars by this scale box, and at the time I was hurt I was attending to my work, and thinking about my duties, and looking for a signal from the yardmaster, and was not thinking about the box. I did not see it immediately prior to the time I struck it. The scale box was at the same place when I struck it, as it was when I first went to work for defendant." Record p 22

Here the plaintiff himself testifies that he knew of the location of the scale box before he was hurt. Then the very purpose of the statement in the application for employment was to call his attention to the fact

that "it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, **track scale boxes**, water tanks, coal houses, platforms, sheds, roofs and other overhead and side structures, and that in performance of the duties for which you are employed you are liable to receive injuries by being knocked off the side or top of cars unless you use due care to avoid injury thereby." The very purpose of this statement was to inform Swearingen of the fact that the **scale boxes** were elements of risks incident to his employment, and were dangerous, and when he saw a **scale box** or a platform, or a coal chute, and was working adjacent to or around them, that they themselves were **warnings** of danger and he must exercise proper precaution in order to prevent an injury to himself. In other words, take the case at bar, Swearingen's attention had been specifically called to the fact that the company had scale boxes constructed so near as to be dangerous unless he exercised proper precaution to protect himself. With this knowledge, just as soon as Swearingen saw the scale box in question, and knew its location, it was incumbent upon him to exercise all precaution to prevent injury, and, in view of the issues in this case, the court below committed a grave error in not permitting the defendant company to show that, in the exercise of good faith and in the performance of a legal duty imposed upon it, it had advised Swearingen of the very risk and danger which caused his injury. We, therefore, submit that the learned Judge who rendered the opinion of the Circuit Court of Appeals at New Orleans, in holding that such a notice was contrary to public policy, has defeated the very end that was

sought to be accomplished as a matter of public policy in passing laws prohibiting contracts against negligence. This application for employment does not seek to relieve the company of any liability for negligence. It does not seek to bind the employe by contract reliving the company of any of its lawful duties to him, but it seeks to comply with the legal obligation of the employer to notify the employe of the risks of the employment. It is in the line of humanity, and is based upon public policy, and good faith between the employer and employe, and to hold that such a contract is void is practically to hold that the employer should not in the exercise of good faith and humanity advise his servant of the great risk and dangers incident to train service. We call the Court's attention to the fact that in addition to calling the servant's attention to the fact that in the operation of its road it was necessary to have scale boxes constructed in dangerous proximity to its tracks, it also called his attention to the fact that there were other dangers, such as coal chutes, depot platforms and overhead structures. It would have been impossible to have set out in minute detail the exact location of the scale boxes, coal chutes, depot platforms, and the exact distance between the side of a car and the coal chute, depot platform and scale box; nor would this be required, either by law or a good business judgment; but when the master tells a servant that these things are dangers, and that in the operation of his business it is necessary to have such things, then when the servant ascertains the location of these risks he is at once put upon his guard, and must exercise proper care to prevent an injury. In other words, when the

servant locates the scale box, or locates the platform, or locates the coal chute, and is working in connection therewith, he assumes the risk of doing so with full knowledge of the fact that he has been advised in advance that there is an increased danger and that he must be on the lookout for this increased danger. It is evident in reviewing the opinion of the learned Judge of the Circuit Court of Appeals for the Fifth Circuit that he did not consider the purpose for which the application for employment was introduced, that is, to show that the master had performed his duty in advising the servant of a risk, not for the purpose of showing that the servant had contracted away any right, not introduced for the purpose of being a bar to any recovery, but introduced for the sole purpose of showing that the master had performed his duty, and to be submitted to the jury as evidence that the servant knew of the danger incident to working with a scale box of whose location he testified he was advised, and having the jury say whether or not, under these circumstances, he was entitled to recover. If this Court should follow the decision of the Judge who tried the case, and the decision of the Circuit Court of Appeals, it would practically annul and revoke the rule established not only by this Court, but by every court in the land, that it is the duty of the master to advise the servant of the dangers incident to his employment, and would prohibit the master from showing as a defense to a recovery that he had in good faith so advised the servant of such risk and such danger. The United States Circuit Court of Appeals at New Orleans, in its opinion, cited the case of Gulf, Colorado & Santa Fe Ry. Co. v. Darby, 67 S. W., 446, in the

matter of contracts limiting the liability of the master company against public policy, but that opinion itself recognizes the duty of the master to call the attention of the servant to the risks and dangers incident to the employment. If the defendant company had introduced the notice for the purpose of showing that the plaintiff below was estopped from any recovery on account of the recitation in this blank, regardless of the fact whether or not the master had been negligent, the case of Railway versus Darby might be in point, and the opinion of the learned Judge of the Circuit Court of Appeals at New Orleans might have some bearing upon this case. But it was not introduced for any such purpose, but introduced for the sole purpose, and limited to that purpose, of showing that the master had advised the servant of certain risks incident to the employment, and when the servant located those risks and dangers, and was working in connection therewith, it was proper to submit the question to a jury as to whether or not he had not assumed such risks, or was not guilty of contributory negligence in the manner in which he conducted himself, in view of the fact that he had knowledge of such risks. We call the Court's attention to the charge of the court below upon the question of knowledge upon the part of the plaintiff below as to the existence of the scale box. The Court's charge is as follows:

> "Upon this point you are instructed that if you believe from the testimony that, prior to the plaintiff's injuries, he knew of the existence and location of the scale box and the danger incident to the discharge of his duties while passing the same on moving train, if danger there was; or if, knowing of the location of the structure, the

danger to the employes while in the usual discharge of their duties was apparent, that is open to observation, then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the **existence** and **location** of the **scale** box would not, as a matter of law, charge him with a knowledge of the danger, if such there was, due to **its proximity** to the north rail of track No. 2; and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence."

Record p 34

This Court's attention is called especially to so much of said charge as reads as follows:

> "In this connection, you are further instructed that the mere fact that the plaintiff **knew** of the existence and **location** of the scale box would not, as a matter of law, charge him with a knowledge of the danger, if such there was, **due** to its **proximity** to the north rail of track No. 2; and whether he knew of the danger is a question of **fact** for you to determine from a consideration of all the facts and circumstances in evidence."

Record p 34

In view of this charge to the jury, we respectfully submit that the defendant below had the right to introduce the written application, signed by Swearingen himself, in which his attention was called to the fact that scale boxes were located in such close proximity to the tracks of defendant company that they were dangers, for the reason that, taken in connection with the testimony of Swearingen himself that he knew of the location of the scale box in question, then he at once became advised of the fact that it was a danger, it was, at least, proper evidence to submit to the jury as to

whether or not, in view of the signed statement to the effect that his attention was called to the fact that scale boxes were constructed in dangerous proximity to the tracks, he should then have been on the lookout for such scale boxes and guarded himself.

Here the Court submits the issue to the jury, and charges them in effect that although he knew of the location of the scale box, yet it was a question of fact for the jury to say whether or not, knowing such location, he knew that there was a danger, and at the same time the Court prevents the defendant company from introducing written evidence to show that it had called Swearingen's attention to the fact that he must be on the lookout for the dangers incident to working in connection with scale boxes. It is needless to present to the Court the question that this error was harmful to the defendant company. It was the leading issue in the case, and one that the jury must have found against the company, or else it could not have found a verdict. The Court will see, by an examination of the opinion of the Circuit Court of Appeals of the Fifth Circuit in this case, that the learned Judge who wrote the opinion intended by the opinion to modify the terms and limit the application of the rules theretofore announced by courts of the highest authority with reference to the doctrine of assumed risk. The opinion is published in 122 Fed. Rep., page 195, and the announcement of the Court that it did so intend to modify such rules is found on page 205 of the opinion. We beg to submit that in view of the very reasons given by the learned Judge in that opinion, that the tendency of the Federal Courts had been for a liberal interpretation of the law of negligence in favor of the public, and especially

of servants, and that legislation had been enacted by Congress to promote the safety of employes and travelers upon railroads, and that in Texas so much of the fellow-servant doctrine as applied to railway employes had been annuled, and any contract between employes and employers as seeking to impose upon employes an assumption of risk from the negligence of their fellow-servants declared void," that the greater reason exists why the employer should be authorized and entitled to show that he had called the employe's attention to risks and dangers that the employe and the master had the legal right to contract in regard to. It is further apparent from that decision that the Circuit Court at New Orleans was of the opinion that the contract for employment was introduced for the purpose of being in bar to any recovery, and not alone for the purpose of showing that the master had exercised good faith in advising the servant of a risk. The whole opinion indicates this, and the Court practically passed upon this question alone in the opinion. The Court cites the general rule of law that a servant is held to assume the ordinary risks of the business which he enters, so far as those risks at the time of entering upon the business are known to him, or should be readily ascertainable by persons of his age and capacity, in the exercise of ordinary care. Fed. Rep. 122, p. 204. Yet while recognizing this rule, it practically holds that the master is estopped from showing that he has advised the servant of a risk incident to the employment, and a risk that the master has to maintain in the conduct of his business, and a risk such as a servant should be advised of in order that he may protect himself against it. We respectfully submit that no

Court has held, and no legislation has been enacted, to the effect that the master is relieved of the duty of advising a servant of a risk incident to the employment, and one unknown to the employe; that the rule of law upon this subject is unchanged and needs no modification, as it is a rule of law based upon humanity and good faith; and said rule of law existing, it follows as a sequence that if the master owes this duty to the employe, when sued for a breach of same he should be entitled in any court to show that he in good faith had advised the servant of a danger incident to the employment and of the specific risk. That is what the defendant company undertook to do in the trial of this case, to show that it had so advised Swearingen of the risk incident to working in connection with scale boxes. The court below refused to permit the defendant company to introduce such evidence, and on appeal to the Circuit Court of Appeals at New Orleans that court practically held that such a contract or such evidence is contrary to public policy and could not be introduced. We submit that this was error, and grave error; that the decisions on this question need no modification or limitation; that they are sound in principle and based upon good faith and humanity, and that the rule of law governing this feature of the case has not been changed, either by State legislation or by national act; that the opinion of the Circuit Court of Appeals in holding as it did contravenes the rule of law laid down by this Court, and is erroneous.

The plaintiff in error submits the third, fourth, fifth and sixth assignments of error together; they are as follows:

> "2nd. The trial court erred in refusing to permit defendant to introduce in evidence portions of the

written application for employment as a brakeman on defendant's railroad, made by plaintiff to defendant on February 22nd, 1902, as shown by defendant's bill of exception; because said testimony was material to defendant, in this: that the questions asked plaintiff in said application, and the answers made thereto by plaintiff, show that plaintiff had notice of the location of the track scale box, and that he was in danger of being knocked off a car in passing same.

3rd. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant, because the undisputed evidence established that said track scale box was erected in the defendant's yard and under the circumstances in a reasonably safe place and at a reasonably safe distance and location from track No. 2, on which track plaintiff was riding at the time he was injured.

4th. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant because plaintiff testified he knew of the location of the track scale box, and the location of track No. 2 with reference to said track scale box, on which track No. 2 he was riding at the time he was hurt, and because the undisputed evidence shows that the track scale box and the danger of same was open and obvious to the view of plaintiff, and that neither the track scale box or the dangers thereof were hidden or latent, and plaintiff was presumed to know the danger and assume the risks thereof.

5th. The trial court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant for the reason that the entire and uncontroverted testimony established the fact that plaintiff knew of the location of the track scale box, and location of said track No. 2, with reference to said track scale box, on which track he was riding at the time he was hurt, and that the track scale box, and the dangers of the same was open and obvious to the view of plaintiff, and

not hidden or latent, and plaintiff was presumed to know the dangers and assumed the risks.

6th. Because the trial court erred in the following portion of its charge to the jury:

'The defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact, and that by continuing in the work, with such knowledge, he assumed all risks incident to and arising out of his employment. Upon this point you are instructed that if you believe from the testimony that prior to the plaintiff's injuries he knew of the existence and location of the scale box, and of the danger incident to the discharge of his duties while passing the same on a moving train, if danger there was; or if, knowing of the location of the structure, the danger to the employes while in the usual discharge of their duties was apparent, that is, open to observation, then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box, would not, as a matter of law, charge him with knowledge of the danger, if such there was, due to its proximity to the north rail of track No. 2, and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence.'

Because the proof showed that plaintiff knew of the location of the track scale box, and of track No. 2, on which he was riding at the time he was hurt, in reference to said scale box, and that the same and the location thereof was open and obvious to plaintiff's view, and being an experienced brakeman, he was charged with notice that riding on the cars as he did was dangerous, and he assumed the risks thereof, and the Court should have so charged the jury."

The practical effect of all of above assignments of error is that the Court committed an error in not instructing the jury to find for the defendant in error, and we will discuss said assignments of error from this standpoint alone. We submit the following propositions of law in support of said assignments of error, and will discuss same in view of the decisions here cited.

In every case before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

I.

Authorities:

Improvement Co. v. Munson, 14 Wallace, bottom page 448;
Commissioners, Etc. v. Clark, 94 U. S. 278, bottom page 284;
Pleasants v. Fant, 22 Wallace, bottom page 120;
Randall v. B. & O. Ry. Co., 109 U. S. 482;
Railway Co. v. Converse, 139 U. S. 469–472;
Schofield v. C. M. & St. P. Ry. Co., 114 U. S. 615–619;
Steamship Co. v. Merchant, 133 U. S. 375.

II.

(*a*) When a servant enters into the employment of another he assumes all the risks ordinarily incident to the business. He is presumed to have contracted in reference to all the hazards and risks ordinarily incident to the employment; consequently he cannot recover for injuries resulting to him therefrom.

(*b*) The servant takes the risks of the master's mode of conducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work.

(*c*) There are risks and dangers incident to most employments, those risks the parties have in view when engagements for services are made, and in consideration of which the rate of compensation is fixed. In all engagements of this character the servant assumes those risks that are incident to the service, and as between himself and the master he is supposed to have contracted on those terms, and if an injury is sustained by the servant in that service, it is regarded as an accident, and the misfortune must rest on him.

Authorities:

Woods' Master & Steward, 2nd Edition, Section 326;
Woods' Railway Law, 3rd Volume, Section 370, page 1452;
A. & E. Encyclopedia of Law, Volume 14, bottom page 843, Section 23, under head of Master and Servant; also bottom page 845, under sub-head Master's Business Methods;
Texas & Pacific Railway Co. v. Minnick, 57 Fed. Rep., pp. 362–8;
Tuttle v. Railway, 122 U. S. 189;
Randall v. Railway, 109 U. S. 478;
H. & T. C. Ry. Co. v. Conrad, 62 Texas 627;
Woodworth v. St. Paul M. & M. Ry. Co., 18 Fed. Rep. 282;
Missouri Pacific Ry. Co. v. Summers, 71 Tex. 700;
Green v. Cross & Eddy, Receivers, 79 Tex. 130;
Naylor v. Railway Co., 5th A. & E. R. R. Cases 406;
Wonder v. Baltimore Ry. Co., 32 Maryland 411;

Crilly v. Texas & Pacific Ry. Co., decided by Louisiana Supreme Court, January 4, 1892, reported in Vol. LIII, A. & E. R. R. Cases, p. 104;
Kohn v. McNulty, Receiver, 147 U. S. 238.

III.

When the proof establishes a usage or custom, the presumption is that the employe contracted with regard to said usage or custom, and if he seeks to avoid its force and effect, the burden is upon him to show that its existence had been concealed from him by the company, and that he did not know of same, nor could have known of same, by the use of ordinary diligence.

Authorities:

Watson v. Railway Co., 58 Tex. 438.

Since the decision in the case of Improvement Co. v. Munson, 14 Wallace, bottom page 448, it has been well recognized that in the Federal Courts the old doctrine of "scintilla" of evidence is not the rule of law; that the rule is not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. It is further well estalished, as announced in said decisions, that a servant in entering the employment of a master, takes the risk of the master's mode of conducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work. It is the undisputed evidence in this case that it is absolutely necessary in the operation of railways, and in the operation of defendant's railway, to have scale boxes as much so as it is to have platforms and coal

chutes. It is the undisputed evidence in this case that the company has a standard which it used in the construction of its scale boxes, as much as it has in the construction of its platforms and coal chutes. It is the undisputed evidence in this case that the plaintiff himself had been advised that in the conduct of defendant company's business and affairs, it was necessary to have platforms, coal chutes and scale boxes in close proximity to its tracks, and that they were dangerous, and he must guard against such dangers. It is the undisputed evidence in this case, the plaintiff himself testifying that he knew the location of this particular scale box near tracks No. 2 and 1 in the yard at El Paso. It is the undisputed evidence that this scale box had been there for more that four years prior to the time plaintiff was hurt and that he had been working in the yard in connection with the weighing of cars upon this scale for a week prior to his injury. It is the undisputed evidence that this scale box was a large structure, and was patent and obvious, and could be seen by any one working in connection therewith. In connection with plaintiff's evidence that he knew of the location of this particular scale box, he states that he had no knowledge of the distance between the scale box and track No. 2. He states he was never warned of the danger of getting knocked off of cars by this scale box. We submit that no duty was imposed upon the master to advise Swearingen of the exact distance between the scale box and the side of a car; that no duty was imposed upon the master to furnish him with a measuring stick to measure this distance, but we do respectfully submit that when the master called Swearingen's attention to the fact that it was

necessary in the operation of its business, to have scale boxes, and that they were constructed in dangerous proximity to the tracks, that then Swearingen contracted in regard to the construction of every scale box along the track, and in every yard operated by the defendant company, and when he worked in any yard from El Paso to New Orleans, and saw a scale box, he at once was advised that this was a danger, and an obvious danger, without the necessity of being specifically advised as to the distance between the scale box and a car passing it. Under the facts in this case, and the theory upon which it was presented by the court below, and which was affirmed by the Circuit Court of Appeals, the only way that the defendant company could defend itself against a recovery herein, would be to show that it had advised Swearingen, or he had become advised, of the exact distance between the side of a car and the scale box in the El Paso yard, and make it incumbent upon the master company in this instance to advise every employe working in its yards from El Paso to New Orleans, of the exact distance between the scale boxes and cars operated in the yards. That this would be impracticable, and in many instances absolutely worthless, can be readily seen, because each man would have to guard himself against this danger by first ascertaining the length of his own arm and the distance he could hang out before the scale box became a danger. A fleshy employe would be in greater danger than a thin one, and it would be reducing the rule to an absurdity to say that the master should give the actual measurement between said scale box and the side of a car to an employe, in order to advise him of such danger. In this instance the master did what

any sensible and responsible business man would do. He advised the employe generally that such things were dangers, that they were absolutely necessary in the operation of its railway, and left it to the employe to exercise his own judgment in protecting himself when he worked in connection with such dangers. The plaintiff himself testified that he knew of the location of the scale box before he was hurt (see Record, page 22); that he knew it was between tracks 1 and 2, but did not know anything with reference to its proximity to track 2 (see Record, page 11). He testified that he knew it was necessary to let down a lid upon the south side of the scale box, so as to get at the balances to weigh the cars; that he knew the scale box was there, that he knew the track was there, and that he knew they were not **very far apart**, but **how far apart** he did not know (see Record, page 23). E. B. Smith testified that the scale box on side track No. 2 had been in El Paso for more than four years to his knowledge, at the same point, and that track No. 2 is a switch track, and comes near by and past the depot, and is in use every day for switching; that it is the track most frequently in use at the west end of the yard (see Record, page 24). Said Smith further testified that depot platforms are built as close or closer to the tracks than scale boxes, for convenience in facilitating the work there, and so are the coal chutes; that a man using proper care could safely pass the scale box while riding on the side of a car on track No. 2. W. T. Butts testified that he, in connection with the plaintiff, had worked on the track at the west end several times before on the day plaintiff was hurt; that plaintiff worked on the north side of track or cars,

and on track 2; that he had often seen plaintiff working on that track before the accident; had seen him pass the scale box on the car several times, and seen him lean in and dodge it. These facts are undisputed and without contradiction, and prove the following facts: That plaintiff was an experienced switchman; that he entered the service of the Texas & Pacific Railway Company with full knowledge of the risk incident to working in yards where scale boxes were located; that he was advised of such risk; that in addition to being so advised in this instance of such a risk, he knew of his own personal knowledge the location of the scale box in question, and that it was close to the track; the exact distance he did not know, but he knew that it was dangerous, and that he should exercise proper precaution to protect himself. We submit to the Court, under this state of facts, that the plaintiff unquestionably assumed such risk as incident to his employment, and that no recovery can be had. In connection with the authorities above cited, we call the Court's attention to the case of St. Louis Southwestern Ry. Co. v. Spivey, decided by Civil Court of Appeals of Texas, reported in Texas Court Reporter, pages 434 and 435. We quote the decision in full, as we can find no official publication of same as yet:

"(Civil Appeals, Fifth District. April 4, 1903.)

ST. L. S. W. RY. CO. v. SPIVEY.

Railway Company — Negligence — Obstruction Near Track—Warning—Personal Injuries—Employe.

Appeal from the District Court of Hunt County; H. C. Connor, Judge.

E. B. Perkins and Perkins and Craddock, for appellant.

Looney & Clark, for appellee.

Motion for rehearing overruled April 25, 1903.

Action by Norman Spivey against St. Louis Southwestern Railway Company. From a judgment in favor of plaintiff, the defendant appeals. Affirmed.

TEMPLETON, Associate Justice—Suit by Norman Spivey, a minor, by next friend, against the railway company to recover damages for personal injuries. A jury trial resulted in a judgment for plaintiff for $875.

It was alleged in the petition that the plaintff, who is sixteen years old, was employed as a call boy in and around the company's shops, yards and depots at Commerce; that it was his duty to carry orders to employes of the company working in the said shops, yards and depots; that one night he was sent by his boss to carry certain orders from the freight depot to the passenger depot; that a freight train was passing in that direction and that he swung on to the side of one of the box cars thereof for the purpose of riding to his destination; that while he was so riding in said position his body came in contact with the upright portion of a set of the company's scales for weighing cars, whereby he was injured; that the scales were erected in such close proximity to the track as to endanger the safety of any one riding as he was, and that he did not know the fact; that he had not been warned of the said dander; that it was dark and there was no light at or near the scales; that he was engaged in the performance of the duties of his position when he was injured; that it was customary for call boys and all other employes of the company at Commerce to swing onto passing engines and trains whenever it was convenient for them to do so, in going from point to point in the yards in discharge of their duties; that the custom was known to and acquiesced in by the company, and that it facilitated the dispatch of the company's business for them to so ride on such engines and trains.

> The petition stated a good cause of action. It is true, as contended by appellant, that if it was necessary to erect the scales at the point where the same were placed, a charge of negligence could not be based on the proximity of the scales to the track. But, as we understand the petition, the negligence charged against the company was in employing the boy at a business in which, in the course of the performance of the duties of his position, he would be exposed to danger, without warning him of the danger or taking the proper precautions to make it manifest. The boy was justified, under the custom alleged, in riding on the train as he did; and if he did not know the danger of riding past the scales in the position he was in at the time, and had not been warned of the danger, negligence on the part of the company might be inferred."

We call the Court's attention to the statement in said opinion to the effect "that it is true, as contended by appellant, that if it was necessary to erect the scales at the point where the same were placed, a charge of negligence could not be based upon the proximity of the scales to the track." The scale inspector and constructor of the Texas and Pacific Railway Co., S. M. West, testified that the scale box was constructed in accordance with the standard adopted by the road, and in accordance with the way they are constructed elsewhere, and they were not negligently constructed and that they are standard scales; that he tested a car upon this side of the track when he put in these scales; that he tested one upon the day of the trial; that he stood in the stirrup and held to the ladder, and cleared the scale six or eight inches; that the distance he constructed this scale box from No. 2 track was standard and considered

sufficient in putting in such scales, where the tracks are standard gauge apart (see Record, page 28, 29, 30). This testimony is undisputed, and uncontradicted, and when taken in connection with the testimony of plaintiff himself that he knew the location of the scale box, and that it was "in close proximity to the track, although he could not say in exact inches how close," it certainly was a risk of the business that he assumed, and assumed with full knowledge of such risk. The Court, in the Spivey case above quoted, recognizes the principle that the master owed the duty to the boy to advise him of this risk, as it was such a risk as the boy would not necessarily know in his line of employment. In the case at bar, the master fully advised the employe of the risk, and of a risk that was in the line of his employment, and in addition to so advising him, the employe had actual personal knowledge as to this risk. Surely, if ever there was a case where it was proper for the Court to instruct the jury to find a verdict for the defendant, this is one, for the reason that only one lawful, logical conclusion can be drawn from the facts in this case, that is that the employe had been advised of the risk, that he had full personal knowledge of it, and that with such personal knowledge he carelessly and negligently permitted himself to be injured, his own statement being that he had forgotten the scale box. After the master has notified an employe of a risk, and after the employe has personally advised himself of such risk, he cannot take advantage of his own act or forgetfulness in order to fix and base a liability against the master who has acted in good faith with him. If his own act or forgetfulness in this instance is the cause of his injury, he certainly is estopped from

asserting it, and contending that the master is liable for his injury because, forsooth, he the employe was forgetful.

For the errors assigned we respectfully submit that the cause should be reversed and remanded.

JOHN F. DILLON,
D. D. DUNCAN,
T. J. FREEMAN,
Attorneys for the Texas and Pacific Railway Co., Plaintiff in Error.

FILE COPY.

Supreme Court
FILED
NOV 24 190
JAMES H. McKENNEY,
Cl

In the Supreme Court of the United States.

TEXAS AND PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs. No. 16

W. W. CLARKSON,

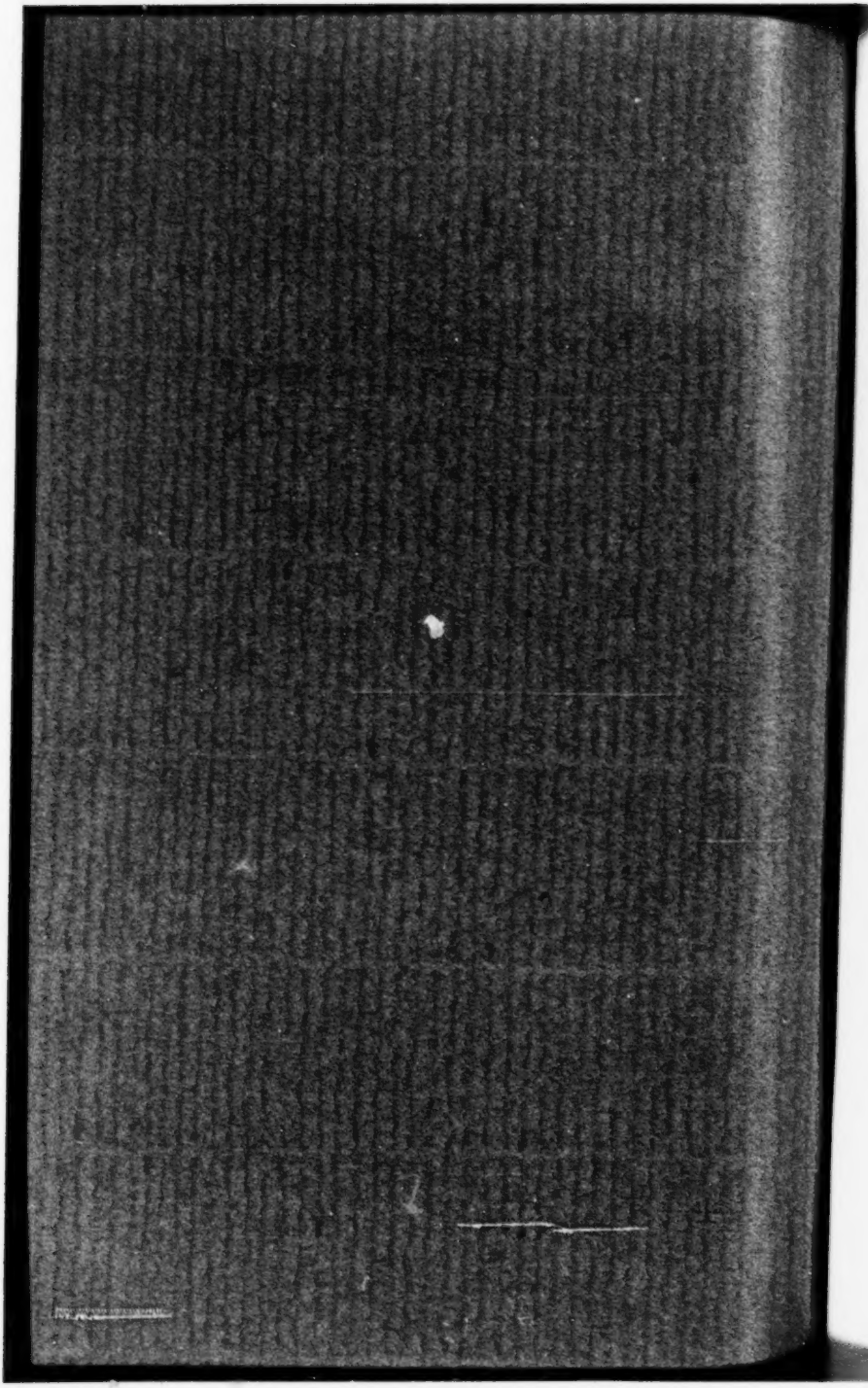
Defendant in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

[illegible]

W. W. CLARKSON,
Defendant in Error.



In the Supreme Court of the United States.

TEXAS AND PACIFIC RAILWAY COMPANY

Plaintiff in Error,

vs. No. 48

W. W. SWEARINGEN, *Defendant in Error.*

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

The preliminary statement of the pleadings and other proceedings by plaintiff in error is correct, and so much of the evidence as is there given is also correct.

However, the evidence as contained in the bill of exceptions is set out in full in the record (pp. 19-32) and is

there so condensed that further condensation is not practicable, and reference is therefore made to same as there set out and will not be here reproduced, but such parts of it as may be considered necessary in the argument will be given in the appropriate place.

There are but two questions in the case and these are (1) did the court commit prejudicial error, if any, in excluding the testimony offered by defendant, plaintiff in error here, concerning which complaint is made by it in its brief herein under its first assignment of error? and (2) did plaintiff, defendant in error here, assume the risk of injury in the manner in which he was injured?

I.

Counter Proposition Under Plaintiff in Error's First Assignment of Error.

The court correctly excluded the evidence mentioned in said first assignment, because it was not evidence of any fact in issue in the case, or, if it should be held that it was competent, still its exclusion was harmless error, because, at the utmost, it was no more than cumulative.

(1) The reference therein to track scale boxes is too indefinite and general to give notice of this particular scale box and its location, or that there was a scale box in the El Paso yards, the place where the injury occurred.

(2) The application from which same is taken was made two years prior to the injury and pertains to a different employment from that in which defendant in error

was engaged at the time he was injured, namely, service as brakeman on the road, (and which defendant in error had long since left) and it did not contemplate his rendition of services in the El Paso yards, hence could not have applied to the scale box in question.

(3) Even though the evidence had been competent and proper on the question of notice, its exclusion was harmless error by reason of the fact that defendant in error testified that prior to his injuries he knew of the location of said track scale box and said track No. 2, and giving the excluded evidence the utmost possible effect as notice it could not have more fully informed him.

(4) The four questions and answers constituting the rejected evidence, are all offered together and it is not contended in argument by plaintiff in error that any one of them except the first has any tendency to show notice to defendant in error of the location or danger of the said scale box, and the failure to separate that question from the others was sufficient to justify the court in excluding all of them.

(5) The language employed in the first of said questions does not inform the employe that any of the structures there referred to are in dangerous proximity to the track, but rather leaves the contrary inference and would give him to understand that said structures are at a safe distance from the track, so long as the employe is not guilty of any negligence.

(6) Such clauses and provisions in applications for

employment are held viod under the laws of Texas as an effort to limit or avoid liability for one's own negligence, and, therefore, against public policy, and the courts will not give effect to them indirectly when refusing so to do directly.

We add to the statement of plaintiff in error under this assignment the following testimony of plaintiff: "When I worked for defendant as brakeman I had nothing to do with switching in the yards."

ARGUMENT.

Counsel for plaintiff in error in their argument studiously ignore the fact that at the time defendant in error was injured he was not working under employment procured by virtue of the application from which the excluded evidence was taken. This application was made nearly two years prior to the time defendant in error received his injuries and was for employment in a different branch of the service, to-wit, as brakeman, and under the employment procured by virtue thereof, the defendant in error worked but one trip between El Paso and Toyah, and then resigned, and did not re-enter the service of plaintiff in error until about six weeks prior to receiving his injuries, and had not been employed as a switchman, in which capacity he was injured, but one week at the time he was injured. In view of these facts it is respectfully submitted that anything contained in said application is wholly incompetent and irrelevant upon any of the issues in this case.

The attention of the court is further directed to the fact that in the argument of counsel for plaintiff in error they assume that the excluded evidence informed defendant in error of the dangerous proximity to the track of the company's scale boxes along its line. This is not the case, and, as stated above, the language quoted will not bear that construction; but on the contrary, makes the danger to the employe dependent upon his failure to exercise due care, which would be true of any branch of employment in the railway service.

Not only does the first question which it is so strenuously argured gives the warning of the dangerous location of these structures, fail to give such warning, but the succeeding question endeavors to put upon the employe the burden of seeking out and locating said structures himself, a duty which the law does not impose upon him and will not permit the master so to do by the method employed by plaintiff in error.

No contention has been made that the excluded evidence was valid as a contract, but it is sought to reach the same result by insisting in argument that it was competent as tending to show the existence, proximity to the tracks and danger therefrom of the scale box. Plaintiff in error owns probably more than 1500 miles of track and it seems untenable to contend that the general statement that it is necessary, at certain points on the line, to have divers structures, among them track scale boxes, which may cause injury to the employe if he fails to use due

care, can be construed into, or has any tendency to show, knowledge upon the part of an employe of the location of any particular structure, none having been specified. As well might the employe be told in general terms that railroading is a hazardous business, and he is liable to injury unless he shall use due care. There is scarcely an instrumentality used by a railroad in the operation of its trains which will not cause injury to employes not using due care, and if an employe may be made to assume the risk of injury by any number of them, by enumerating them with an injunction to use due care, why may not he by a similar process, be made to assume each and all the perils and hazards of the business arising from the company's negligence? The duty to use due care rests upon the employe without such notice and the giving of it can neither add to, nor detract from, that duty, hence the excluded evidence was not of a character to place upon plaintiff any greater responsibility than already attached to him, nor to relieve plaintiff in error of its duty in the premises.

A similar clause was discussed in the case of G., C. & S. F. Ry. vs. Darby, 67 Southwestern, 446, a Texas case, and the Court of Civil Appeals decided that it was viod as a contract and that it did not constitute any notice whatever and sustained the trial court in ignoring it in the charge to the jury. A full discussion of such clauses is had in the case and numerous authorities are cited, and reference will here be made to same without further citation.

In view of plaintiff's testimony that he knew of the location of the scale box between tracks Nos. 1 and 2 before he was hurt, and that this was more than said excluded evidence could have established if admitted, its exclusion was harmless error, even if the court should decide that it was competent.

II.

The other assignments of error all go to the second point mentioned above, namely, that of assumed risk, each presenting it in one form or another, and all will be considered together under one proposition, which is as follows:

In order to charge a servant with the assumption of the risk of injury from a danger created by the negligence of the master, it must be shown that the servant had knowledge of such danger and continued in such employment without complaint, or else, that such danger was so obvious and patent that by the exercise of ordinary care he might have known of it. In this case the evidence shows that the danger through which plaintiff received his injuries was created by the negligence of the defendant, and that it was a latent danger and unknown to plaintiff and that at the time of receiving his injuries plaintiff was in the exercise of due care, hence it would have been error for the court to have instructed the jury as requested in said motion of defendant.

The several statements made by plaintiff in error are not considered full enough nor are they succinct. Hence defendant in error submits the following additional:

Statement.

The evidence establishes these facts:

1. That defendant erected, and for years maintained, in dangerous proximity to the north rail of track No. 2 the scale box structure in question.

Plaintiff testified that the space in the clear between the ladder on the side of the car on said track No. 2 and the nearest side of the scale box was 21 inches. (Rec. p. 21); also that scale boxes on other railroads in El Paso are farther from the side tracks than was this one, that on the Rock Island Railway being 117 inches, on the G., H. & S. A. Railway 168 inches, and on the A., T. & S. F. Railway 130 inches. (Rec. p. 22.)

E. B. Smith, defendant's superintendent of terminals, testified, that the space in the clear between the scale box and the ladder on a car on track No. 2 is 19 1-2 inches (Rec. p. 25), and that a well developed man cannot safely pass through that space while riding on the ladder on the side of a car if he hangs out from the car, (Rec. p. 25), but that a man using proper care could safely pass through it (Rec. p. 25).

Switchman Williams testified that he found out the first day he worked in defendant's yards that the scale box would not clear a man riding on the side of a car unless he was careful and used precaution, (Rec. p. 26), and Fireman Butts testified to substantially the same thing, saying he found out right away, (Rec. p. 29), as did, also, Yardmaster Moore who fixed the time within a week. (Rec.

p. 30). He said "if a man in passing the scale box on the ladder of a car swings out he will strike it. He must hug the car to clear it."

S. M. West, defendant's scale expert and inspector, fixes the clear space between the scale box and the ladder on a car on said track No. 2 at 21 inches. (Rec. p. 28). He also stated that if one's feet rested on the brake beam or oil box while he held the ladder with his hands it would throw his body out farther from the car and his head and shoulders would strike the scale box, (Rec. p. 39), while if he stood in the stirrup holding the ladder with the hands one's body would clear the scale box; that he, himself, tested it and found that his body would clear the scale box six inches, (Rec. p. 39); that in 1892 he built the scale box where it was when plaintiff was hurt and there has been no change in its location since then (Rec. p. 28).

2. That plaintiff was not guilty of any negligence at the time he was hurt.

Plaintiff testified that as a brakeman he had nothing to do with switching in the yards (Rec. p. 20) and that he did no switching there prior to January, 1902, during which month he switched extra in El Paso yards two nights and three days, and that he did not remember using No. 2 track during that time. (Rec. p. 22.) He had switched seven days consecutively next before the time he was hurt. (Rec. p. 20.) The scale box was painted a light green (Rec. p. 19) and plaintiff was injured after dark. (Rec. p. 20.)

Plaintiff further testified, (Rec. p. 20); "My duties as a switchman were to assist in the moving, placing and switching cars, coupling and uncoupling them, and making up trains, and generally to obey the orders of Yardmaster Moore, under whom we were working, and my duties also required me to ride on the cars while they were being moved. • • • • My station was with the engine. The engine was at the west end of the yards, west of track No. 2 with me with it, and it backed down east into No. 2 track, with me riding on the foot board at the east end of the engine, to get these cars, and we passed the scale box although I did not see it, and reaching the cars I coupled the engine on to them and not getting the signal from the yardmaster who was still further east of me as was also the other switchman, Williams, I walked east down the string of cars about two car lengths, and getting the signal I passed the same to the engineer, and the engine and cars started up again, going west so as to get out on another track, and as the cars started I got on a box car to ride down past the switch at the west end of track No. 2, so as to throw the switch and let the train in on another track. There is a ladder on the side of a box car, and a step called a stirrup under the ladder under the bottom of the car, and I was holding onto the ladder with my hands (illustrating by holding his hands above his head as if climbing a ladder) and my lantern was hanging on my right arm and I was looking back east for a signal from the yardmaster, as it was my duty to do. I do not know

whether he wanted to give me one or not, but it is my duty to be on the lookout, although I do not have to look in his direction all the time. • • • • • We had probably 8 or 10 cars at the time, and I was riding properly and hanging out a little from the car, which is proper, and I was on the north side of the car, which was also proper, so as to signal the engineer."

Plaintiff further testified (Rec. p. 22): "I knew the location of the scale box before I was hurt. I knew it was between tracks Nos. 1 and 2, but I did not know anything with reference to its proximity to track No. 2, and I did not know it was dangerously close to track No. 2. At the time I was hurt I had no knowledge of the distance between the scale box and No. 2 track. I set cars on the scale track to be weighed, but I would be on the north side of the cars on track No. 1, and as the scale box is on the south side I could not see it. I had nothing to do with the scale box and had no business around it. I first learned the exact distance between the scale box and the nearest rail of track No. 2 a few days ago when I went down and measured it at your (referring to plaintiff's attorney) recommendation. I was never warned about the danger of getting knocked off the cars by this scale box, and at the time I was hurt I was attending to my work and thinking about my duties and looking for a signal from the yardmaster, and was not thinking about the box. I did not see it immediately prior to the time I struck it. The scale box was at the same place when I struck it as it was when I

first went to work for defendant. During the seven days I worked for defendant we never used this No. 2 track at the west end or near the scales, and I never saw a car on track No. 2 opposite the scales, and never had my attention called to the distance between the track and the scale box. I never measured or approximated the distance to it. Nothing ever occurred to attract my attention to it."

Plaintiff further testified that he had set cars on the scale track to be weighed, but had never helped to clear No. 2 track so the weigher could get to the scale box, and denied that he had any conversation with Switchman Williams about the scale box not clearing a man on the side of a car on track No. 2. (Rec. p. 23.)

E. B. Smith, defendant's superintendent of terminals testified: "While riding on a car on the ladder the customary position of a switchman is to swing out from the car with his body." (Rec. p. 25). "I have seen switchmen riding on the oil box and brake beam, and have told them not to do it, but I never discharged anyone for doing it." (Rec. p. 25.)

Yardmaster Moore testified (Rec. p. 30): "We employ a code of signals by means of a lantern to do switching at night, and it is proper for a switchman to look out for signals from others, and it is proper for a switchman to ride on the ladders of a car. It is a common practice for switchmen to put their feet on the oil box and grab hold of the ladder while switching, and, in my judgment, there is no more danger in putting your feet on the oil

box and catching the ladder to ride than there is in putting your feet in the stirrup and holding the ladder. The stirrup is not in the way of the feet or legs when riding with the feet on the oil box and holding the ladder."

Scale Inspector West testified, (Rec. p. 29): "Neither the oil box nor the brake beam are put on the car to be ridden on with the feet but the switchmen use them for that purpose all the time. I have seen them do it a thousand times in the El Paso and other yards of the defendant."

Authorities and Argument.

Upon the hearing of this cause in the circuit court of appeals, defendant in error cited and reviewed a number of authorities upon the question of assumed risk, nearly all of which are cited and reviewed by the learned judge who wrote the opinion in the case in that court, and since said opinion is set out in the transcript of the record in this court, defendant in error will not here cite and review said authorities, but will merely refer to them as cited and reviewed in said opinion, adding a few only which are not reviewed or cited in that opinion:

Cent. Tr. Co. vs. E. T. V. & G. R., 73 Fed. Rep., 661, a case of injury by station limit board. It was held that the servant did not assume the risk, although he had seen the board before.

This court speaking through Mr. Justice White in T. & P. R. Co. vs. Archibald, 170 U. S., at 674, used the

following language which is particularly applicable to the point under discussion:

"Indeed, the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty or endeavor to supply safe appliances, since it subjects an employe to all risks arising from unsafe ones if the business be carried on by the employer without reasonable care and the employe knew, or by diligence could have known, *not of the dangers incident to the business, but of the harm possibly to result from the employer's neglectful methods.*"

In George vs. Clarke, 85 Fed. Rep., 608, is very tersely stated the rule as to risks assumed by the servant: "A risk which the master has created by doing or permitting something to be done which ought not to have been done, or by omitting some precaution which, in the exercise of ordinary care ought to have been taken, cannot be regarded as one of the ordinary risks of any employment."

The case of the G., C. & S. F. Railway Co. vs. Darby, 67 S. W. Rep., page 446, a Texas case, cited in the opinion of the circuit court of appeals, and also *supra*, was a case of a projecting roof of an oil house which inflicted injury upon a brakeman on a caboose, and states clearly the law applying to such cases and covers every point raised in this case, including the introduction in evidence of part of an application similar to that offered in the present case; and the case of the G. H. & S. A. R.

Co. vs Mortson, also cited in the opinion of the circuit court of appeals, is reported in 71 S. W. Rep., 707, being also a Texas case.

So far from being a case in which a peremptory instruction for defendant should have been given, it is respectfully submitted that the evidence so preponderates in favor of plaintiff on the question of his lack of knowledge on the question of danger that fair minded men could scarcely arrive at any other conclusion than that he did not have such knowledge and was not guilty of a failure to exercise ordinary care in failing to discover it.

"It is only where the facts are such that reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

Grand Trunk R. C. vs. Ives, 144 U. S., 408 at 417.

Gardner vs. Mich. Cent. R. Co., 150 U. S., 349 at 361.

Richmond & D. R. Co. vs. Powers, 149 U. S., 44.

Mo. Pac. R. Co. vs. Everett, 161 U. S., 451.

These cases are also cited generally on the questions arising in the case.

Unless the plaintiff assumed the risk of injury the exception must be overruled. He testified that he was not aware of the proximity of the scale box to the north rail of track upon which he was riding when injured, nor did he know that it was dangerously close to said rail, hence unless he be charged with knowledge on the theory that the danger was so patent and obvious that

he is conclusively presumed to know it, the trial court was correct in refusing to give the requested charge. That it was dangerously close to said track 2, and was negligently so placed by the defendant, is not seriously controverted, and plaintiff in error has briefed the case upon that assumption. Starting with this basis let us see what burden is cast upon defendant in error. He owes no duty to inspect and discover dangers created by the master's negligence, and is only required to exercise ordinary diligence in the use of his faculties, and if such dangers are not disclosed to him thereby he is not chargeable with knowledge of them. He has a right to presume that the master will furnish him a track free from obstructions, and he is in a proper place and performing his duty in a proper manner when injured. It was after dark and the scale box was of a color not to be easily seen after nightfall, and it was the first time he had passed that scale box on the side of a car on that track 2, and, at the time, he was looking in another direction for a signal, as it was his duty to do, and not being aware that he was approaching the scale box he had no opportunity to observe its dangerous proximity. He had never seen a car on that track 2 opposite the scale box and nothing had occurred to attract his attention to its proximity thereto. He had a general knowledge that the scale box stood between tracks 1 and 2, and that was all he knew about it. He had nothing to do with the scale box and had not been about it except to set cars on the scale

(No. 1) track to be weighed, and then he was on the north side of said scale track and the car that was being weighed was always between him and the scale box and he could not see it. He had only worked in the yards as a switchman a few days and he testified that he had no recollection of passing the scale box on track 2 prior to a few minutes before the injury, when he passed it on the foot board of the engine. He did not notice the scale box at that time, and even though he had it is not to be supposed that with the engine in rapid motion he could have taken any accurate measurements of the probable clearance between such scale box and a passing car. Now that plaintiff has been injured and accurate measurements of the distances have been taken the danger has become apparent to all of us; but was it so before? Since no duty of inspection devolved upon plaintiff he was not required to "lay a foot rule" to the structure, and in the absence of a car opposite it on said track 2 there would be nothing to call attention to the limited clearance. The rail of said track 2 is so nearly even with the surface of the ground as to be of little aid to the casual observer and is certainly not calculated to attract special attention or at once impress upon a person the dangerous proximity of the scale box to the track. Up to the time he was injured he had never before been placed in a situation with reference to this structure that he did, or could, observe its exact location with reference to safety in passing it upon track 2, and it is for the jury to say whether or not he acted with

ordinary prudence at that time. At the utmost the additional space required for safe clearance between the scale box and the rail of track 2 is a matter of but very few inches, perhaps three to six, and it would take a trained eye to even approximate the distance between those objects and determine the question of safety when applied for that purpose. It would require, first, a determination of the distance between the box and the rail, then the projection of the moulding at the top of the box (which really caused the injury, striking plaintiff's shoulders), then he must return to the rail and calculate the distance which a car would probably project over the rail, then make an accurate mental measurement of his arm from the knuckles to the rear part of his shoulder, then make an accurate surmise as to the probable angle at which he would, or would have a right to, swing from the ladder and he might also have to determine whether or not, in the event he caught the ladder one rung too near the stirrup and doubled himself jackknife fashion, the rear and lower part of his body might protude further than would his shoulders if he were in the natural and more upright position, with the upper part of his body swinging out. In view of this can it be said as a matter of law that plaintiff was bound to know all these things merely because he knew there was a scale box there? If the margin is shown, after accurate measurements and tests, to be so comparatively small, plaintiff certainly cannot be charged with a lack of ordinary prudence in

not correctly gauging the distance when no occasion had before arisen so to do, and when the occasion did arise it was dark and the box not seen by him. There seems to have been a divergence of views at the trial as to the box being a safe distance from the track. Defendant's scale expert thought it safe if plaintiff had exercised proper care, and Superintendent of Terminals Smith was inclined to the same opinion, while Yardmaster Moore took a week to discover that one could not safely pass without "precaution." Switchman Williams says he discovered it the first day he worked there, when Fireman Butts discovered it by the special circumstance of "seeing the switchmen lean in and dodge it." If these employes of defendant, all of them experienced, hold such divergent views and had such varying experience, it seems but reasonable to allow to plaintiff at least some latitude in the matter. If these were all reasonable men and do not reach the same conclusion in the matter then it would seem that the question should be left to the jury, since the rule is that unless *all* reasonable men *must* arrive at the same conclusion upon a given state of facts to withdraw the question from the consideration of the jury would be improper.

The case might be different had plaintiff been injured on the scale track, as, in that event it might be reasonably contended that he must expect a scale box near the track, as would probably be the case if he went upon a coal chute track or one where a mail crane should

be erected, these being structures which, from their nature must be close to the track and these facts are known to all experienced railroad men, but no such rule obtains with reference to a scale box in its relation to side tracks other than the scale track itself.

While the second assignment of error in plaintiff in error's brief is vague it is gathered from all that is said under it that the construction of switch yards and structures therein must, in all cases be left to the judgment of the master, and that the application thereto of the technical knowledge of those employed in that behalf is conclusive against any negligence upon the part of the master, or at all events calls into action the doctrine of assumed risk, but it is not perceived why a jury may not as well inquire into the application of technical knowledge in the construction of the switch yards and structures therein as any other portion of the road or its instrumentalities. Although Scale Inspector West testified that he crowded track 2 with the scale box because the fulcrum lever of the scales is standard and of a certain length, and that there was no more room for tracks, yet Superintendent of Terminals Smith said there was room for 4 or 5 more tracks south of track 4. This being the case tracks 1 and 2 might have been further apart, or the scale box could have been placed on the north side of track 1, or on the south side of track 4, 51 feet south of its present location. The box was placed closer to track 2 than to track 1. Superintendent Smith says it is 17

feet from the center of track 1 to the center of track 2, and that such is standard distance. From the center of track 2 to the outside of the north rail thereof is 31 inches, from there to the scale box moulding is 45 inches; the scale box is 18 inches thick with 2 1-2 inch moulding on each side, giving a total of 99 inches, thus leaving 105 inches from the moulding on the north side of the scale box to the center of track 1. Deduct from this 31 inches from the center of track 1 to the outside of the south rail of said track and there is left 74 inches in the clear between the scale box moulding and the south rail of said track 1, thus indicating that scale manufacturers and railroads generally consider that distance necessary, because, presumably acting together, they have fixed the length of the standard fulcrum lever so as to require the scale box to be that far from the scale track. Thus it will be seen that there is probably a lack of the application of any technical knowledge so far as proximity to track 2 is concerned and the scale box was put in haphazard, as to the said track No. 2. Note that the fulcrum of the track scale is of such length as to require 74 inches in the clear between the outside of the nearest rail of the scale track and the scale box, and the scale box cannot be placed nearer to the scale track, and the plaintiff in error can be said to have a standard as to the scale track, but notwithstanding counsel in their brief would have the inference drawn that they also have a standard as to their tracks near the scale box, the evidence does not bear them out.

Their scale expert, referred to by counsel in their brief, testified as follows: "The scales are 16 inches from the side of the car on the side track at Shreveport Junction; 21 inches at Dallas; about 22 inches at Texarkana. In Jefferson there is no side track at that side; at Pecos City the scale is a joint one owned by the defendant and the Pecos Valley Railroad, and stands on joint ground where there is plenty of room," (Rec. p. 29), thus clearly showing that the plaintiff in error has no standard as to distance of side tracks from the scale box other than the scale track itself, since no two of the scales belonging to the company are the same distance from the side tracks nearest them, and where there are side tracks in its yards running alongside the scale box other than the scale track, they are all much closer to the scale box than common prudence would allow, and much closer than other railroads build them as shown by the testimony. (Rec. p. 22.)

In arguing this question of proximity of the scale box to track No. 2, counsel for plaintiff in error seek to class it with coal chutes and depot platforms, structures which it is a matter of common knowledge, and also given in evidence by the company's superintendent, must of necessity be built closer to the tracks than scale boxes, and every experienced railroad man is well aware of that fact, and the scale box structures are not to be classed with such as these. Taking the standard adopted by the company, any employe would have a right to presume that the scale box would not be built any nearer to an adjoin-

ing track than it would to the scale track; and that he would therefore have 74 inches clear space instead of 45 inches as in the case at bar. Counsel for plaintiff in error seek to impress that the scale box and scale track are standard. No complaint is made as to this, but the point of objection is that the scale box structure was too near the other track which was not in any way connected with the scales.

In their argument in this court, counsel for plaintiff in error persist in asserting that the "undisputed evidence" shows notice to defendant in error of the danger and also speak of it as establishing other facts, which are disputed and controverted at every point. Counsel upon the trial of the cause did the same thing, making the same erronous statements in making their assignments of error, and attention is here called to these facts that it may not be taken that counsel for defendant in error admits the correctness of these statements, with which the argument of counsel for plaintiff in error bristles.

The cause having been properly tried and the judgment being clearly for the right party, the defendant in error respectfully prays that same be affirmed.

Swearingen & Clark

Attorney for W. W. Swearingen,
Defendant in Error.

Supreme Court of the United States.

No. 48.—October Term, 1904.

The Texas and Pacific Railway Company, Plaintiff in Error, *vs.* W. W. Swearingen.	In error to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 19, 1904.]

Mr. Justice White delivered the opinion of the Court.

This suit was commenced in a State court by W. W. Swearingen, the defendant in error, and, on the application of the defendant, the Texas and Pacific Railway Company, was removed to the Circuit Court of the United States as one arising under the laws of the United States, because the railway company was chartered under an act of Congress.

The action was to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant company, in whose service at the time of the injury the plaintiff was employed as a switchman. The negligence alleged on the part of the company was the existence, in close proximity to a switch track, of a scale box, by striking against which the plaintiff was injured whilst doing duty as a switchman. In addition to a general denial the railway company specially pleaded that the scale box in question was at a safe distance from the track on which the plaintiff was hurt when working and, moreover, that the plaintiff had assumed the risk, if any, arising from the situation of the scale box, and had in any event been guilty of contributory negligence. There was a verdict and judgment for the plaintiff, and an affirmance of such judgment by the Court of Appeals. (122 Fed. Rep. 193.)

The assignments of error are based, first, on a ruling of the trial court in rejecting evidence; second, on the refusal to direct a verdict; and, third, on an exception taken to the charge given to the jury. To pass upon them requires an appreciation of the proof, and therefore, before coming to consider the assignments, we summarize the testimony.

The accident occurred after dark on the evening of February 7, 1902, in the switch yards at El Paso. It was shown that in that yard there were several tracks. One track, No. 1, ran over the bed of the scales in question. On the right of this scale there was what was called a scale box, which rose to about the height of six feet, and was about five feet wide and eighteen inches deep. On the other side of this structure there was a

track described as track No. 2, and beyond this, to the right, were two other tracks, known respectively as track No. 3 and track No. 4. The space between a ladder on the side of a freight car when moving on track No. 2 and the scale box in question was shown by the evidence to be only 19½ inches.

The plaintiff testified concerning the accident as follows:

"I was hurt on the evening of the 7th of February, 1902, while working as a switchman after dark, at about 6 o'clock and 45 minutes.

"I was a day switchman, but we worked until after dark.

"My duties as a switchman was to assist in the moving, placing and switching of cars, coupling and uncoupling them, and making up trains, and generally to obey the order of Yardmaster Moore, under whom we were working, and my duties also required me to ride on the cars while they were being moved.

"On this night we were making up a transfer to take to the Southern Pacific Railway, and the cars we had to get were on No. 2 track. My station was with the engine, called 'following the engine.' I worked up near the engine.

"The engine was at the west end of the yards, west of track No. 2, with me with it, and it backed down east into No. 2 track, with me riding on the footboard at the east end of the engine, to get these cars, and we passed the scale box, although I did not see it, and reaching the cars I coupled the engine to them, and not getting a signal from the yardmaster, who was still farther east of me, as was also the other switchman, Williams, I walked east down the string of cars about two car lengths, and getting the signal I passed the same to the engineer, and the engine and cars started up again going west so as to go out on another track, and as the cars started I got up on a box car to ride down past the switch at the west end of track No. 2, so as to throw the switch and let the train on another track.

"There is a ladder on the side of a box car, and a step called a stirrup under the ladder under the bottom of the car, and I was holding on to the ladder with my hands (illustrating by holding his hands above his head as if climbing a ladder), and my lantern was hanging on my right arm, and I was looking back east for a signal from the yardmaster, as it is my duty to do. I do not know whether he wanted to give one or not, but it is my duty to be on the lookout, although I do not have to look in his direction all the time, when my right shoulder struck the scale box, and I fell down between the scale box and the cars, and I was dragged and badly injured. We had probably eight or ten cars at the time, and I was riding properly and hanging out a little from the car, which is proper, and I was on the north side of the car, which is also proper, so as to signal the engineer."

The employe who built the scales testified as follows:

"It is my business to know how much a car passing on a side track will clear the scale box, and these tracks at this place are standard gauge apart, and the scale box is standard, and as I had to put the scale box there to facilitate business and for convenience, I had no more room because the lever of the scale is a certain length to get the fulcrum. The

tracks are standard, and are not further apart, because there is no more room to put them farther apart.

* * * * * *

"The distance that I put this scale box from track No. 2 is standard, and is considered a safe and proper distance in putting in scales where the tracks are standard gauge apart.

* * * * * *

"I am bound to put my scales in according to the length of the lever, and if tracks are already there and are standard distance apart I have a uniform and standard distance from the tracks.

"We have side tracks at most places on each side of the scales. The tracks in this yard are standard gauge apart, and where ground is scarce we have to economize in space, but where ground is plenty the tracks can be further apart."

The evidence for the company also showed that the scales in question had been erected a number of years prior to the happening of the accident and after tracks Nos. 1 and 2 were built. The superintendent of terminals of the defendant company testified that "south of track No. 4 there is a space left for four or five more tracks." The same witness also stated that the customary position of a switchman while riding on a car and ladder "is to swing out from the car with his body," and that "a well-developed man cannot safely pass by the scale box on track No. 2, while riding on a side of a car on the ladder, if he hangs out from the car."

There was evidence that at other yards than the one in question the distances from the side of a standard box car to adjoining scale boxes varied from sixteen inches to one hundred and sixty-eight inches.

Testimony was introduced tending to show that the plaintiff, before he was hurt, knew of the proximity of the scale box to track No. 2. Concerning his employment and knowledge of the location of the scales, plaintiff testified that he had made one trip as extra brakeman in the service of the railway company in January, 1900; that in December, 1901, as brakeman, he made about one trip between El Paso and Toyah; that he had worked in the El Paso yards, as extra switchman, two nights and three days in January, 1902, and went to work there regularly as switchman on February 1, 1902. He denied any recollection of ever having worked on track No. 2 during his employment in January, 1902, and, referring to his employment in the early days of February, 1902, plaintiff says:

"During the seven days I worked for defendant we never used this No. 2 track at the west end, or near the scales, and I never saw a car on track No. 2, opposite the scales, and never had my attention called to the distance between the track and scale box. I never measured or approximated the distance to it. Nothing ever occurred to attract my attention to it.

* * * * * *

"I knew we had to pass the scale box at the time I was hurt, so as to get to the switch beyond, but I was not thinking about it, and I did not see it when we passed it going in after these cars.

"The switch engine had a headlight lighted at both ends, and I was on the footboard at the rear of the engine, which put me in front while we were backing into track No. 2 after the cars, but the headlights were not very clean or bright.

"There was nothing to hide the scale box from my view; it was perfectly open and apparent."

Plaintiff further testified:

"I knew the location of the scale before I was hurt. I knew it was between tracks Nos. 1 and 2, but I did not know anything with reference to its proximity to track No. 2, and did not know it was dangerously close to track No. 2.

"At the time I was hurt I had no knowledge of the distance between the scale box and No. 2 track.

"I set cars on the scale on track No. 1 to be weighed, but I would be on the north side of the cars on track No. 1, and as the scale box is on the south side I could not see it. I had nothing to do with the scale box and had no business around it.

"I first learned the exact distance between the scale box and the nearest rail of track No. 2 a few days ago, when I went down and measured it at your (referring to plaintiff's attorney) recommendation.

"I was never warned about the danger of getting knocked off of cars by this scale box, and at the time I was hurt I was attending to my work, and thinking about my duties, and looking for a signal from the yardmaster, and was not thinking about the box. I did not see it immediately prior to the time I struck it.

"The scale box was at the same place, when I struck it, as it was when I first went to work for defendant."

The evidence was closed by the offer on behalf of the company of portions of a written application by plaintiff for employment as brakeman, dated February 22, 1900. After stating that the plaintiff identified the application, the bill of exceptions recites as follows:

"Defendant then offered in evidence the following portions of said application, consisting of questions and the answers thereto written by the plaintiff, for the purpose of showing that plaintiff had notice of the location of said track scale box, and that he was in danger of being knocked off of a car when passing the same:

"Question. 'Do you make this application for employment in train service, realizing the hazardous nature of such employment, understanding that it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, track scale boxes, water tanks, coal houses, platforms, sheds, roofs and other overhead and side structures, and that in performance of the duties for which you are employed you are liable to receive injuries by being knocked off the side or top of cars, unless you use due care to avoid injury thereby?'

"Answer. 'Yes.'

"Question. 'Do you agree to acquaint yourself with the location of all overhead and truss bridges, as well as the location of all other structures along the line of the road?'

"Answer. 'Yes.'

"Question. 'Do you understand that no officer or employe of this company is authorized to request or require you to use defective tracks, cars, machinery or appliances of any kind, and that when you do so you assume all risk of injury therefrom?'

"Answer. 'Yes.'

"Question. 'Do you understand that this company desires to employ only experienced men in the service, and does not undertake to educate inexperienced men?'

"Answer. 'Yes.'

"Counsel for plaintiff objected to the said testimony for the reason that it was irrelevant and immaterial, and that plaintiff had made this application and entered the employ of defendant, and afterwards resigned, and again entered the employ of the defendant some two years later, without making another application, and also because it was an effort on the part of defendant to limit its liability for its own negligence, and void as against public policy, and because the particular location of this track scale box is not given; and the court having sustained plaintiff's objections and excluded said testimony, the defendant then and there excepted to the action of the court in excluding said evidence, and tenders this, its bill of exceptions, which is allowed, signed and sealed by the court."

The first assignment of error assails the affirmance by the Court of Appeals of the action of the trial court in refusing to receive in evidence the matter just referred to.

These excerpts were offered in evidence, as stated in the bill of exceptions, "for the purpose of showing that plaintiff had notice of the location of said track scale box, and that he was in danger of being knocked off a car when passing the same."

The application was made in February, 1900, and was for employment, not as switchman, but as brakeman. The employment of the plaintiff with the defendant company following the application was in December, 1901, when the plaintiff as a brakeman made about a dozen trips between El Paso and a place called Toyah. His subsequent employment as switchman commenced but a short time before the happening in February, 1902, of the accident complained of.

We think the trial court rightly excluded the offered evidence. In the first place, the defendant had testified that before the accident he had knowledge of the existence of the scale box. In the next place, while undoubtedly the statements in the application tended to show that the plaintiff was aware of the generally hazardous nature of the employment and the necessity of the exercise of care in working with and about the instrumentalities employed by the company in the operation of its railroad, the recognition of these facts by the plaintiff and his agreement to acquaint himself with the location of bridges and other structures on the line of the road did not tend to establish notice, communicated to the plaintiff, that the defendant company had not exercised due care in placing scales or scale boxes on its tracks, or that the company had by its negligence increased

the ordinary hazards to be expected from the use of such structures, and that by the exercise of ordinary care on his part plaintiff could not escape injury. The evidence was therefore immaterial in the light of the issue upon which the jury had to pass.

At the close of all the evidence the defendant company requested the court to charge the jury to return a verdict for the defendant, and to the overruling of such motion the defendant company duly excepted. The second assignment alleges error in the affirmance by the Court of Appeals of the action of the trial court denying this motion.

The right to have the jury instructed to find for the company was based upon the following contention:

"*a.* Because the undisputed evidence established that said track scale box erected in the defendant's yard, and under the circumstances in a reasonably safe place, and at a reasonably safe distance and location from track No. 2, on which track plaintiff was riding at the time he was injured.

"*b.* Because plaintiff testified he knew of the location of the track scale box and the location of track No. 2, with reference to said track scale box, on which track No. 2 he was riding at the time he was hurt, and because the undisputed evidence shows that the track scale box and the danger of the same was open and obvious to the view of plaintiff, and that neither the track scale box nor the dangers thereof were hidden or latent, and plaintiff was presumed to know the danger and assumed the risks thereof.

"*c.* Because the uncontroverted testimony established the fact that plaintiff knew of the location of the track scale box, and location of said track No. 2, with reference to said track scale box, on which track he was riding at the time he was hurt, and that the track scale box, and the dangers of the same, were open and obvious to the view of plaintiff, and not hidden or latent, and plaintiff was presumed to know the danger, and assumed the risk."

The motion was properly overruled. So far from it being the fact, as asserted, that the evidence established indisputably the existence of the grounds upon which the motion was based, the record shows that there was evidence tending to establish that the track scale box was not erected in a reasonably safe place, and that, although the plaintiff knew that the scale box was situated adjacent to track No. 2, he did not know that it was so near that it could not be passed, in the performance of his duties as a switchman, without danger. This is apparent when it is borne in mind that the plaintiff testified, in substance, that prior to the accident he had not closely inspected the scale box or taken measurements of the distance from the box to the north rail of track No. 2, and that he did not do more than cursorily observe the structure from a distance, and that he was unaware of the nearness of the scale box to the north rail of track No. 2.

Prima facie, the location of scales where the tracks were only the standard distance apart, and where a space of less than two feet was left for the movements of a switchman between the side of a freight car and the

scale box, encumbered, as he would be in the night time, with a lantern employed for the purpose of signalling, did not incontestably establish the performance by the defendant company of the duty imposed upon it to use due care to provide a reasonably safe place for the use of the switchmen in its employ. And so far from the proof making it certain that the necessity of the situation required the erection of the structure between tracks Nos. 1 and 2 as existing, there was proof that the railway company owned unoccupied ground, intended for other tracks, to the south of track No. 4, justifying the inference that the distance between tracks Nos. 1 and 2 might have been increased, and the employment of the scales thus rendered less hazardous to switchmen, or that the scales might have been removed to a safer location.

It was, therefore, properly a question for the determination of the jury whether or not the scales were maintained in a reasonably safe place, and if not, whether the plaintiff had notice thereof. The Court of Appeals was of opinion, and rightly we think, that the dangerous contiguity of the scale box to track No. 2, and the extra hazard to switchmen resulting therefrom, was not so open and obvious on other than a close inspection, as to justify taking from the jury the determination of the question whether there had been an assumption of the risk. The plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed, and as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge of the danger, that he had assumed the hazard incident to the actual situation. (*Choctaw, O. & G. R. R.* v. *McDade*, 191 U. S. 64, 68.)

The remaining assignment of error questions the correctness of the following portion of the charge to the jury:

"The defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact, and that by continuing in the work, with such knowledge, he assumed all risks incident to and arising out of his employment. Upon this point you are instructed that if you believe from the testimony that prior to the plaintiff's injuries he knew of the existence and location of the scale box, and of the danger incident to the discharge of his duties while passing the same on a moving train, if danger there was; or, if knowing of the location of the structure, the danger to the employes while in the usual discharge of their duties was apparent, that is open to observation, then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box would not, as a matter of law, charge him with knowledge of the danger,

if such danger there was, due to its proximity to the north rail of track No. 2, and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence."

The grounds of the objection to the charge being thus stated:

"Because the proof showed that plaintiff knew of the location of the track scale box, and of track No. 2, on which he was riding at the time he was hurt, in reference to a scale box, and that the same and the location thereof was open and obvious to plaintiff's view, and being an experienced brakeman, he was charged with notice that riding on the cars as he did was dangerous, and he assumed the risks thereof, and the court should have so charged the jury."

This assignment but reiterates contentions made in connection with the assignment based on the alleged error in overruling the motion for judgment. As we have already decided that knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 could not be imputed to the plaintiff simply because he was aware of the existence and general location of the scale box, it was for the jury to determine, from a consideration of all the facts and circumstances in evidence, whether plaintiff had actual knowledge of the danger.

We find no error in the judgment of the Circuit Court of Appeals, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.